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"*Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ᾽ὀρθῶς ἔχον ὀφθῇ καὶ τὸ χρήσιμον.*"—Arist. *Pol.* II. 1.

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MAITRE ÉDOUARD CLUNET.

[*Contribué par* M. LOUIS RENAULT, G.C.M.G., *Professeur de droit international à la Faculté de Droit de l'Université de Paris.*]

ÉDOUARD CLUNET, avocat à la Cour de Paris, est né à Grenoble (Dauphiné) en 1845. Il a été élève à l'École des Chartes, principal clerc d'avoué. Sergent pendant la guerre de 1870 avec l'Allemagne, il a été capitaine au 24ᵉ régiment d'infanterie territoriale.

Sa carrière s'est poursuivie au barreau de Paris, où il a conquis de bonne heure une grande notoriété par des plaidoiries dans de nombreuses affaires connues, surtout en ce qui touche les questions internationales.

Il est à Paris "legal adviser" des Ambassades d'Angleterre et d'Espagne.

Il a été l'avocat de la France dans le grand débat amené par le blocus des ports du Venezuela par l'Angleterre et l'Allemagne en 1902 ; ce débat, qui s'est suivi à La Haye en 1903, a été intéressant par la question de droit soulevée[1] et par le nombre des Puissances figurant au procès : d'un côté, Angleterre, Allemagne, Italie ; de l'autre, France, Belgique, Pays-Bas, États-Unis, Espagne. M. Clunet avait comme adversaire notamment Sir Robert Finlay ; il a été l'avocat de la Turquie dans le différend turco-russe jugé à La Haye en 1913.[2]

Il est membre de l'Institut de Droit International presque depuis sa fondation et il en a été président en 1911. Il a été aussi président de "l'International Law Association."

Ce qui a surtout contribué à faire connaître en France, et, on peut le dire, dans tous les pays, le nom d'Édouard Clunet, c'est le service qu'il a rendu à la science et à la pratique par la fondation du

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[1] Droit de préférence réclamé pour les créanciers des Puissances bloquantes.

[2] Intérêts moratoires réclamés à la Turquie à raison de son retard à s'acquitter de sa dette envers les Russes qu'elle devait indemniser.

Recueil désigné ordinairement par son nom et qui a pour titre " Journal du droit international privé et de la législation comparée." Il est extraordinaire qu'un jeune avocat ait eu la claire compréhension des problèmes juridiques des plus en plus nombreux, importants et délicats, qui devaient naître du développement des rapports entre les peuples et qu'après avoir constaté la place insuffisante que ces problèmes occupaient dans les Recueils existants, au point de vue de la doctrine et de la jurisprudence, il ait pu, dès 1874, fonder un Recueil qui devait depuis sans cesse progresser. Le directeur de 1874 est encore le directeur de 1916, et après avoir donné d'abord un volume de 368 pages, il est arrivé à donner des volumes de plus de 1,200 pages. Avec une activité toujours en éveil, de nombreuses relations en France et dans les pays les plus divers, Édouard Clunet a réussi à fournir aux savants et aux praticiens un ensemble de documents, de travaux personnels et d'informations d'une richesse incomparable. Ce sont des articles de doctrine, des analyses de la jurisprudence française et étrangère, des renseignements de toute espèce sur les affaires et les questions ayant un côté international. Il faut avoir, par profession, à s'occuper d'une manière constante de droit international pour se rendre vraiment compte du service rendu par un recueil pareil, et M. Édouard Clunet a plus que doublé ce service en publiant en 1905, au prix d'un effort considérable, des " Tables générales " de son Recueil, qui ne comprennent pas moins de quatre volumes de plus de mille pages chacun. C'est une véritable encyclopédie en raccourci, qui donne, en outre, un Tableau complet des relations conventionnelles de la France. Il n'est pas inutile de remarquer que l'expression " droit international privé " a été prise dans un sens large, de telle sorte que l'on trouve dans le " Clunet " beaucoup d'articles qui touchent, à vrai dire, plus au droit public qu'au droit privé : par exemple, sur l'extradition, le droit pénal, le blocus pacifique, l'expulsion des étrangers. D'ailleurs, depuis la guerre M. Clunet a légèrement modifié le titre de son Recueil, qui s'appelle actuellement " Journal du droit international," de manière à donner aux questions de droit international public l'importance qu'exigent les circonstances.

Il a fallu, certes, de grandes qualités pour entreprendre et pour diriger, pendant plus de quarante ans, sans défaillance, un Recueil dont les mérites viennent d'être indiqués, mais ce serait commettre une injustice que de ne voir dans Édouard Clunet que le " directeur."

Il a aussi payé de sa personne et fourni d'assez nombreux articles consacrés ordinairement à des questions d'actualité, parfois même à des questions brûlantes qui demandaient à être traitées avec beaucoup de souplesse. Il suffira de citer les dissertations (publiées en brochures) ayant les objets suivants : l'affaire Schnaebelé (1887) qui faillit amener une rupture entre la France et l'Allemagne, la question des passeports en Alsace-Lorraine, les offenses et actes commis par des particuliers contre un État étranger, etc. Depuis la guerre, M. Édouard Clunet a publié dans le " Temps " et le " Figaro " de nombreux articles sur des questions nées de la guerre.

Enfin, il y a quelques années, M. Clunet a entrepris la publication d'un important ouvrage sur " les Associations au point de vue historique et juridique " ; un volume a seul paru en 1909. Il s'agit des nombreux groupements qui ont un but autre que celui de réaliser des bénéfices pécuniaires à répartir entre leurs membres : associations de bienfaisance, scientifiques, littéraires, artistiques, religieuses, syndicats professionnels ; les clubs que nous avons empruntés à l'Angleterre y rentrent, et l'auteur donne à leur sujet de nombreux renseignements. Le volume est principalement consacré à l'historique de la législation française, très peu libérale jusqu'à la loi du 1^er^ juillet 1901, qui n'a abouti qu'après que trente-trois projets eussent été présentés aux Chambres depuis 1871. M. Clunet loue le principe de cette loi, tant en faisant remarquer les lacunes, les restrictions et les omissions de l'œuvre accomplie ; il suffit de signaler ce qui concerne les congrégations religieuses, au sujet desquelles l'auteur fait entendre la voix du libéralisme et exprime l'espoir que l'avenir donnera à la France un droit commun sur les associations qui pourra été approuvé par les amis de la véritable liberté.

On croit en avoir dit assez pour assurer à Édouard Clunet toutes les sympathies des jurisconsultes britanniques, s'il ne les avait déjà.

[*Contributed by* T. E. HOLLAND, ESQ. K.C.]

IT is pleasant to welcome the appearance in our Journal of the portrait of a very old friend and colleague. Maître Clunet (born at Grenoble, April 11, 1845) and I were both among those elected *associés* of the Institut de Droit International when it met at the

Hague in 1875. Clunet, already then a rising *avocat*, and member of several learned societies, had in the preceding year commenced the publication of the *Journal du Droit International Privé*, forty-two volumes of which have now appeared, always under the same editor, and constantly enriched by articles from his own pen. Several of these have been reprinted as independent treatises—*e.g.* "Du défaut de validité de plusieurs traités diplomatiques conclus par la France avec les puissances étrangères," 1880; "Offences et actes hostiles commis par des particuliers contre un état étranger," 1887. Clunet's promotion to be *membre* of the Institut followed in due course, and he was its President at the meeting held at Madrid in 1911. He also acted as one of my Vice-Presidents, the other being the lamented Fusinato, at the Oxford meeting in 1913; on which occasion the honorary degree of D.C.L. was conferred upon him by the University. He is Legal Adviser to the British Embassy at Paris, where his position at the bar is one of great distinction, and his legal opinions are in request throughout Europe. He is well known in England, where he once presided over a meeting of the International Law Association, and has been a member of the Athenæum Club since 1896.

Clunet's important contributions to the discussions of the Institut de Droit International are of frequent occurrence in the long series of its *Annuaire*, but he is, no doubt, most widely known as editor of the great periodical the first volume of which appeared in 1874, with the following title:

> Journal du Droit International Privé, recueil critique de doctrine, jurisprudence et législation, concernant les étrangers et les conflits des lois dans les différents pays, publié avec le concours de MM. Ch. Demangeat, conseiller à la Cour de Cassation, . . . et P. S. Mancini, ancien ministre, . . . et la collaboration de plusieurs jurisconsultes français et étrangers, par M. Édouard Clunet, avocat à la Cour d'Appel de Paris.

The object of the work was said to be:

> de donner le tableau comparé du droit international privé dans son développement successif, et de fournir de cette façon à la science la réunion des matériaux nécessaires pour permettre de déterminer *a posteriori* les principes rationnels de cette branche de Droit.

The title became later "Journal du Droit International Privé et de la jurisprudence comparée." The work is often cited simply as "Clunet."

One cannot be surprised at the editor having chosen, as defining the scope of his Journal, the term "Droit International Privé," rather than the older and more scientifically descriptive "Conflit des lois." The newer phrase, formally launched by Fœlix in 1843, but followed by the explanatory words "ou du conflit des lois de différentes nations en matière de droit privé," had already been mentioned by Chancellor Kent, by Massé in 1844, making it synonymous with "les relations internationales individuelles," and by Hosack, writing on "The Conflict of the Laws of England and Scotland," in 1847. It had also been placed upon their respective title-pages by Westlake in 1858, and by Fiore in 1869, followed, however, as alternatives, by "The Conflict of Laws" and by "Principes per risolvere i Conflitti tra legislazioni diverse in materia di Diritto civile e commerciale." The Journal has, no doubt, given increased vogue to the newer phraseology, which has now found wider acceptance, especially among the Latin-speaking races, although Zeballos (1910) pronounces it to be improperly so described, "porque no se aplica á las relaciones de las naciones entre los estados." It is also used with reference to the attempts at a codification of the rules in question, commenced at the Hague in 1893, on the invitation of the Dutch Government.

Maître Clunet's publication has fully held its own, though followed, since 1905, with many expressions of admiration for "son aînée," by the *Revue de Droit International Privé et de Droit Pénal International*, announcing its intention to avoid excursions into public international law. Such have not infrequently appeared in "Clunet," which in 1915 went so far in this direction as to announce that, for the duration of the war, its title will be simply "Journal du Droit International." An address to its readers explains that the change—

> marque ainsi son intention de comprendre,—provisoirement—dans son programme toutes les questions de droit international qui naîtront des événements, sans distinguer entre le droit international public et le droit international privé. . . . Ce mode temporaire de publication lui permettra de suivre pas à pas l'*actualité*. . . . Les problèmes de pur droit privé, issus du jeu normal des lois, passent au second plan.

The result is, "provisoirement," of great value.

THE *ZAMORA* JUDGMENT.

[*Contributed by* H. REASON PYKE, ESQ., LL.D.]

Character of Prize Law.—It has been much canvassed by authorities upon the law of nations whether the law administered by prize courts is international or municipal in character, and whether a British prize court would be bound to give effect to the provisions of an Order in Council which, in the opinion of the judge, were repugnant to the settled principles of international law. On the one hand it is claimed that prize courts are strictly international tribunals, administering a kind of universal law or *ius gentium*, and in no way bound to regard local ordinances and municipal regulations unless they are sanctioned by the law of nations.[1] The more recent authorities, on the other hand, dissent from this view, and contend that prize courts are strictly municipal tribunals which must take their law from the authority under which they sit and which are therefore bound to follow and enforce the enactments of that authority even though inconsistent with the generally recognised rules of international law.[2]

Lord Stowell left the whole question in a very unsatisfactory position, as it is practically impossible to reconcile his *dicta* in the well-known case of the *Fox*[3] with the views he expressed in the *Maria*[4] and other cases. The question was raised again in the recent case of the *Zamora*,[5] in which the Crown sought to requisition a cargo of copper consigned to Sweden in virtue of Order 29, Rule 1,[1] of the Prize Court Rules as authorised by Order in Council, while the claimants contended that the provisions of the Order were illegal and *ultra vires* and not binding upon the Court as being contrary to international law. Sir Samuel Evans considered it unnecessary actually to decide the point of the international or municipal character of British prize law and the legality of Orders in Council,[2] but the question was boldly faced and determined on appeal in the judgment delivered by Lord Parker on April 7 last on behalf of the Judicial Committee of the Privy Council.

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[1] Phillimore, *Int. Law*, 3rd ed. (1885), vol. iii. pp. 654–5; Halleck, *Int. Law* (1878), vol. ii. pp. 433–6; Davis, *Int. Law*, 3rd ed. (1908), p. 370; Baty and Morgan, *War* (1915), p. 360.

[2] Westlake, *Int. Law*, 2nd ed. (1913), vol. ii. pp. 155, 317–18; Oppenheim, *Int. Law*, 2nd ed. (1912), vol. ii. p. 240; Moore, *Digest* (1906), vol. vii. pp. 648–51; Gray, *Nature and Sources of Law* (1909), pp. 122–3; Ptt Cobbett, *Cases*, 3rd ed. (1913), vol. ii. p. 192.

[3] (1811) Edw. 311; 2 E.P.C. 61.

[4] (1799) 1 C. Rob. 340; 1 E.P.C. 152.

[5] (1916) 2 A.C. 77; 32 T.L.R. 436.

Municipal Tribunal.—In this judgment it is established that a British prize court, like every other existing prize court, is a purely municipal tribunal, constituted under national authority. "Of course," declared Lord Parker, "the Prize Court is a municipal court and its decrees and orders owe their validity to municipal law." [3] The formal source of the law it applies is, as the present writer has shown at length elsewhere,[4] the will and power of the State by which it is established; the rights and duties it protects and enforces between captors and claimants are strictly municipal in character; and the material sources of the legal rules and principles by which it is bound can only be determined by reference to the municipal law of its State's constitution. One of the grounds upon which the Court rejected the claim that it was necessarily bound by rules of substantive law enacted by Order in Council was because "the idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by courts of law in this country is out of harmony with the principles of our Constitution."[5] The law of nations has *per se* no authority over a national prize court, and the question of the extent to which such a court shall apply the provisions of that law is a purely municipal one.

Proceeding then to discuss the material sources of British prize law, Lord Parker observed that it could not be "disputed that a prize court, like any other court, is bound by the legislative enactments of its own sovereign State. A British prize court would certainly be bound by acts of the Imperial legislature."[1] It was accordingly held that as the Prize Court Rules, so far as they relate to procedure and practice, have statutory force by virtue of the provisions of s. 3 of the Prize Courts Act, 1894,[2] they are, to this extent, undoubtedly binding. But the Court decided that if Order 29, Rule 1, was to be construed as an imperative direction to the judge, it was not merely a rule of procedure or practice, and that therefore, if it was binding as an imperative direction, it must be by virtue of some power vested in the King in Council otherwise than under the Act of 1894.

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[1] *Man. of Em. Leg.* (1914), Sup. No. 3, p. 510.

[2] (1916) P. 27; 1 Trehern, P.C. 309.

[3] (1916) 2 A.C. at p. 91; 32 T.L.R. at p. 440.

[4] "The Law of the Prize Court," in the *Law Quarterly Review* for April 1916 (vol. xxxii. pp. 144–67).

[5] (1916) 2 A.C. at p. 90; 32 T.L.R. at p. 439.

Control of the Crown.—On this head the Court held that the position was unaffected by the provisions of ss. 53 and 55 of the Naval Prize Act, 1864,[3] or by the substitution under the Supreme Court of Judicature Acts, 1873 and 1891,[4] of the High Court of Justice for the Court of Admiralty as the permanent Court of Prize in this country, and that prior to the Act of 1864 there was no power in the Crown, by Orders in Council, to prescribe or alter the law which prize courts have to administer. Such a power was held to be unconstitutional because the Court considered that the famous Report[5] dated January 18, 1753, of the Committee appointed by George II. to reply to the complaints of Frederick the Great as to certain captures of Prussian vessels made by British ships is conclusive that at that date any notion of a prize court being bound by the executive orders of the Crown was contrary to the best legal opinion of the day; and because the Court might otherwise at any time be deprived of its well-recognised right of determining according to law whether a blockade is rendered invalid either because it is ineffective or because it is partial in its operation. The Court was further fortified in this view by the form of the commission conferring jurisdiction in prize on the Court of Admiralty, which required cases to be heard and determined "according to the course of Admiralty and the law of nations."[6]

Restraint on the Prerogative.—It may be doubted, however, whether the grounds upon which the decision of the Judicial Committee was based were sufficient to establish that under the municipal law of the Constitution a British prize court was bound to apply the rules of international law in restraint of the prerogative of the Crown to make regulations with regard to neutral and other trade and commerce with the enemy. No reference was made to the opinion, quoted with approval by the learned President in the Court below, of the late Professor Westlake, who is rightly described[1] as being "for some fifty years the *viva vox Juris Gentium*—the living voice of the law of nations," in favour of the binding force of Orders in Council. The Crown, that distinguished publicist points out, "is the supreme organ for international affairs, and the judges can no more question its action in them than they can question the action of Parliament in matters of legislation. . . . Whether or not, for instance, Lord Stowell considered the Orders in Council during the Napoleonic wars to be justifiable as measures of retortion against the Continental System, the Orders were acts of state, and he had no choice but to apply them."[2]

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[1] (1916) 2 A.C. at p. 93; 32 T.L.R. at p. 440.

[2] 57 & 58 Vict. c. 39.

[3] 27 & 28 Vict. c. 25.

[4] 36 & 37 Vict. c. 66, and 54 & 55 Vict. c. 53.

[5] De Martens, *Causes Célèbres* (1827), vol. ii. pp. 46–73; Baty, *Prize Law* (1915), pp. 116–34.

[6] *Lindo* v. *Rodney*, (1781) 2 Dougl. 612, n

Supremacy of Prerogative.—It is clear from such instances as those of the Order in Council of July 26, 1557,[3] with reference to the application of the maxim *robe d'ennemi confisque robe d'ami* and Charles I.'s Proclamations of December 31, 1625, and March 4, 1627,[4] with reference to neutral trade with Spain, that anciently the prerogative of the Crown in these matters was supreme, and there is nothing to show that it had been materially affected by disuse or lapse of time. The famous Report of 1753, upon which so much reliance was placed by the Court, was obviously drawn up in consequence of the complaints of a dissatisfied neutral sovereign, and with the object of establishing the fairness and impartiality of British prize courts and showing that in the absence of express interference by constitutional authority their decisions were governed by the law of nations. The statement that the judges were left free and received no order or intimation from the Crown referred to the former practice of the Lord High Admiral and the Crown to interfere directly with the judicial functions of the judge in individual cases, a practice which had subsisted almost to that very time.[1] Such interference was not deemed inconsistent with the Court's commission to adjudicate according to the law of nations.

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[1] By Mr. Norman Bentwich in the *Law Quarterly Review*, *u.s.* p. 215.

[2] *Collected Papers* (1914), pp. 509–10, 516; cf. *Int. Law*, 2nd ed. (1913), vol. ii. pp. 155, 317–18.

[3] Westlake, *Int. Law*, vol. ii. pp. 142–3.

[4] Pyke, *Contraband of War* (1915), pp. 51–2, 108.

Objects of Prize Courts.—One of the primary objects of the establishment of prize courts, as Wheaton shows,[2] is to enable belligerent States to ascertain and fix their responsibility for the acts of their commissioned cruisers. For this purpose a prize court is entitled to decide upon the validity of a blockade which has been instituted on the authority of the officer commanding the belligerent force in the neighbouring seas or upon the effect of belligerent action inconsistent with the maintenance of a blockade which it may be presumed was intended to conform with the generally established principles of international law.[3]

" Prize courts are, at present," wrote Professor Holland in 1907,[4] " courts of enquiry, to which a belligerent Government entrusts the duty of ascertaining whether the captures made by its officers have been properly made, according to the views of international law entertained by that Government." It is possible to urge many considerations in opposition to this view of the functions of prize courts. Thus, as the Judicial Committee pointed out in the case we are considering,[5] all those matters on which the Court is authorised to proceed are, or arise out of, acts done by the Sovereign power in right of war, from which it follows that the King must, directly or indirectly, be a party to all proceedings in a court of prize, and it would be impossible for the Court to act judicially if it were bound to take its orders from one of the parties to the proceedings.

Application of International Law.—Again, in deciding cases of maritime capture, a prize court should apply the law of nations, and a Court which administers that law must ascertain and give effect to a law which is not laid down by any particular State, but originates in the practice and usage long observed by civilised nations in their relations with each other or in express international agreement. Further, the rule of diplomacy that a neutral individual aggrieved by any act of a belligerent Power cognisable in a court of prize ought, before resorting to diplomatic intervention, to exhaust his remedies in the prize courts of the belligerent Power, would entirely vanish if a court of prize, while nominally administering a law of international obligation, were in reality acting under the direction of the Executive of the belligerent Powers.

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[1] Pyke in the *Law Quarterly Review*, *u.s.* at pp. 145, 153.

[2] *Int. Law*, 4th Eng. ed. by J. B. Atlay (1904), pp. 534–6; 5th ed. (1916), pp. 608–9.

[3] The *Rolla* (1807), 6 C. Rob. 364; 1 E.P.C. 573; the *Betsey* (1798), 1 C. Rob. 93; 1 E.P.C. 63; the *Juffrow Maria Schroeder* (1800), 3 C. Rob. 147; 1 E.P.C. 279; the *Franciska* (1855), Spinks 287; 10 Moore, P.C. 37; 2 E.P.C. 346.

[4] *Letters on War and Neutrality*, 2nd ed. (1914), p. 171.

[5] (1916) 2 A.C. at pp. 91–3; 32 T.L.R. at p. 440.

Conflict of International and Municipal Law.—All these considerations, however, are equally applicable to the regulation of prize law by the Legislature or any other organ of the national Government and indicate that it is desirable for the constitution of a belligerent State to provide that its prize tribunals shall be free to apply the rules of international law to the cases that come before them for settlement, untrammelled by any municipal enactments or directions. "His Majesty's Government," declared Sir Edward Grey in his recent reply [1] to the American Note of November 5, 1915, "wish to lay stress on the fact that the principle that no encroachment should be made upon the jurisdiction and the competence of the Prize Court is one which they regard as vital."

Responsibility of Government.—But such an absolutely independent and uncontrolled position for the Prize Court is fundamentally opposed to the established principle that the ultimate responsibility for its decision is always held to rest with the Government of the country to which it belongs. "A Court of Admiralty," says Dr. Hannis Taylor, "is merely an arm of the Government and the sovereign is responsible in damages for its wrong decision." [2] Moreover, a tribunal of prize entirely unfettered by municipal enactments would, like the international prize court which it was the object of the Hague Convention XII. of 1907 [3] to establish, only be practically possible if the contents of the law by which its decisions would be guided were definitely settled and approved by all the Powers concerned and sanctioned by sufficient authority to ensure its due observance by every member of the community of nations.

The course of the present war, however, has demonstrated the powerlessness even of those principles of international law which were hitherto regarded as universally recognised, in the absence of an organised international authority capable of immediately punishing any attempt to violate them. It is notorious, on the other hand, that the prize laws enforced by the great Powers have varied, not only in detail, but also in principle. As Mr. Norman Bentwich points out, there is "not any single law of nations binding upon prize courts, but a number of different practices, each claiming to be the true doctrine, and each administered by national courts."[1]

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[1] *The Times*, April 26, 1916.

[2] *Int. Pub. Law* (1901), p. 581; cf. Lawrence, *Int. Law*, 4th ed. (1910), p. 479.

[3] Pearce Higgins, *Hague Peace Conferences* (1909), pp. 407–44.

In the *Zamora* the Judicial Committee held that in these circumstances the Court "must itself determine what the law is according to the best of its ability, and its view, with whatever hesitation it be arrived at, must prevail over any executive order."[2] It was also held that although an Order authorising reprisals will be conclusive as to the facts which are recited as showing that a case for reprisals exists, and will have due weight as showing what, in the opinion of the Government, are the best or only means of meeting the emergency, "this will not preclude the right of any party aggrieved to contend, or the right of the Court to hold, that these means are unlawful, as entailing on neutrals a degree of inconvenience unreasonable, considering all the circumstances of the case."[3]

Need for International Tribunal.—But although the question whether a belligerent is entitled to retain neutral property seized is a question of law to be settled by judicial proceedings, it would appear that under present conditions the actual rules by which that question is to be determined in the national prize courts should be settled directly or indirectly by the sovereign authority of the State on its international responsibility, and not be left to the unfettered decision of judges, however eminent and upright, who are irresponsible to a foreign Government, otherwise than through its action on their sovereign. On the one hand, the Government should not be able to shelter itself behind its own judges; on the other, those judges should not be able to hamper the Government in any regularised use it may consider necessary under present conditions to make of its sea power for the successful prosecution of the war and the establishment and preservation of the world's peace. Any question of the infringement of neutral rights and of the international validity of the Government's action under a law from which the enemy has by his acts long ago cast off all allegiance should be determined by a really international tribunal, such as that suggested by Sir Edward Grey in his Note to Mr. Page of July 31, 1915,[1] which should, if possible, decide the points in dispute in accordance with rules to be previously settled by agreement, as in the case of the Geneva arbitration with reference to the *Alabama* claims.[2]

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[1] *Declaration of London* (1911), p. 3.

[2] (1916) 2 A.C. at p. 97; 32 T.L.R. at p. 442.

[3] *Ibid.* Sir Samuel Evans, as he was bound to do, followed this ruling in the *Stigstad* (1916), 32 T.L.R. 472.

[1] *Am. Journ. of Int. Law*, Spec. Sup. July, 1915, pp. 164–5.

[2] De Martens, *Nouv. Rec. Gén.* vol. xx. p. 702.

THE PUBLIC TRUSTEE IN INDIA, NEW ZEALAND, AUSTRALIA, AND ENGLAND.

In the following series of articles some account is given of the office of Public Trustee in different parts of the Empire. The essential characteristics of the office as developed in recent legislation are (1) a State official whom any one may appoint as trustee or executor, and (2) a State guarantee for the funds placed at his disposal. Officials entrusted with the administration of estates under an order of a Court do not fall within the scope of this survey, since a characteristic of the confidence placed in the Public Trustee is its voluntary character. Canada and South Africa are not included in this series of articles as there does not yet seem to be a Public Trustee constituted in either of those Dominions.

INDIA.

[*Contributed by* SIR E. J. TREVELYAN.]

In India the functions of a Public Trustee are divided in each Province between two officials, the Administrator-General and the Official Trustee.

Administrator-General.—The history of the office of Administrator-General dates from the establishment of the Supreme Courts. Those Courts were empowered by their charters to grant probates and letters of administration of the estates of British subjects, an expression which, as then used, did not include natives of India. It was found that great inconvenience arose in many cases where Europeans died in India, without leaving next of kin in India. To meet this inconvenience s. 20 of 40 Geo. III. c. 79 enacted that when any British subject should die intestate in the Provinces of Fort William (Bengal), Fort St. George (Madras), and Bombay, or in the territories subordinate to them, and no next of kin or creditor should appear in answer to a citation, the Ecclesiastical

Registrar of the Supreme Court might apply for letters *ad colligenda bona* or of administration.

The office of Administrator-General was first constituted by Indian Act VII of 1849. There were several later enactments[1] on the subject, all of which have ceased to be in force. The present law is to be found in Indian Act III of 1913, which contains the following provisions:

There are three Administrators-General in each of the Presidencies of Bengal, Madras, and Bombay. Their combined jurisdiction covers the whole of British India.

The Administrator-General is entitled to letters of administration, when granted by a High Court, unless they are granted to the next of kin. In the other Courts he is entitled to letters in preference to a creditor, a legatee other than a universal legatee, or a friend of the deceased.

If any person who is not an Indian Christian, a Hindu Mohammedan, Persian Buddhist dies leaving within any Presidency assets exceeding the value of Rs. 1,000 and if no person to whom any Court would have jurisdiction to commit administration of such assets has, within one month from his death, applied in such Presidency for probate or letters of administration, the Administrator-General is required to apply for letters of administration. In case of apprehended danger of misappropriation, deterioration, or waste of assets left by the deceased in the towns of Calcutta, Madras, and Bombay, the High Courts may direct the Administrator-General to apply for letters of administration. He can also be required to collect and hold assets until a right of succession or administration is determined.

Probate and letters of administration granted to an Administrator-General have effect throughout the Presidency, but the High Court can direct that they have effect throughout one or more of the other Presidencies.

A private executor or administrator may with the assent of the Administrator-General transfer the assets of the estate to the Administrator-General.

There are provisions in the Act with regard to the revocation of grants and the distribution of assets. When the assets do not exceed Rs. 1,000 in value, the Administrator-General may, when no probate or letters of administration have been granted, give a certificate to a person, claiming otherwise than as a creditor to be interested in such assets, entitling him to receive the assets. There is also power in certain events to give such certificate to a creditor. There is a further power to send the residue of the assets to the country of domicile of the deceased.

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[1] Indian Acts VII of 1849, XXIV of 1867, XIX of 1869, V of 1870, II of 1874.

The Government of India is required by the Act to make good all sums for which the Administrator-General would be personally liable if he had been a private administrator, except where the Administrator-General and his officers have in no way contributed to the liability.

Until 1902 the Administrator-General received the fees, and the Government incurred no legal liability in respect of his defaults, but he is now a salaried officer of Government, which receives all the fees chargeable under the Act.

Fees both on capital and on income are payable out of the estates taken charge of by the Administrator-General. The fees on capital vary from 3 per cent. on the gross value in the case of small estates to 2 per cent. in the case of large estates. The fees on income vary in the case of movable property from 2 per cent. to 3 per cent., and in the case of immovable property from 3 per cent. to 5 per cent. When the Court has directed the Administrator-General to collect and hold the assets a fee of 1 per cent. on the value of the assets taken possession of, collected, realised, or sold is payable. A small fee is also payable in cases where the Administrator-General grants a certificate. The Administrator has power to reduce the fees to one-half.

The nature of the work done by the Administrator-General is necessarily very varied. During recent years the Administrator-General has had to carry on and eventually to sell amongst others: (*a*) a cigarette manufacturing business; (*b*) a hat shop; (*c*) a dyeing and cleaning business; and (*d*) a spirit distillery. He is at the present time managing two charitable hospitals, and a free school of 200 boys. He has also had to build and equip a Hindu temple in pursuance of a direction in the will of a deceased Hindu.

In early days the Administrator-General was permitted to trade for his own profit with the assets in his hands, but this has long since been forbidden by the law.

Official Trustee.—The office of Official Trustee dates from the year 1843. By Indian Act XVII of that year the Supreme Court had power to appoint the Registrar or other officer of the Court to be a trustee, where there was no trustee willing to act. Act XVII of 1843 was repealed by Act XVII of 1864, which was in its turn repealed by Act II of 1913, which contains the present law on the subject.

There are three Official Trustees. The Official Trustee of Bengal has powers in the greater part of India. The powers of the Official Trustee of Bombay extend to the Bombay Presidency and the Province of British Baluchistan; those of the Official Trustee of Madras extend to the Madras Presidency and the Province of Coorg. The Government can appoint Deputy Official Trustees.

An Official Trustee can (*a*) act as an ordinary trustee, (*b*) be appointed trustee by a Court of competent jurisdiction.

He has, except as otherwise provided, the same powers, duties, and liabilities as ordinary trustees. He may decline any trust. He may not accept any trust under any composition or scheme of arrangement for the benefit of creditors, nor of any estate known or believed by him to be insolvent,

He cannot accept a trust for a religious purpose, or for the management or carrying on of any business. He cannot administer the estate of a deceased person unless he be sole executor and sole trustee under the will.

He cannot be appointed trustee along with any other person.

With his consent he may be appointed trustee in the instrument making the trust, and he may accept a trust contained in a will.

When property is subject to a trust, and there is no trustee within the jurisdiction willing or capable to act, the High Court may appoint the Official Trustee as trustee.

He may also be appointed a trustee by the surviving or continuing trustees of a trust, and all persons beneficially interested therein.

There is also a useful provision empowering an executor or administrator to pay to the Official Trustee a legacy or share of the assets of a deceased person to which an infant or lunatic is entitled.

As in the case of an Administrator-General, the Government of India is responsible for the acts or defaults of an Official Trustee.

Fees are payable at rates fixed by the Government.

NEW ZEALAND.

[*Contributed by* JAMES CHRISTIE, ESQ., LL.M.]

The Origin of the Office.—The first Public Trust Office Act was passed in New Zealand in 1872, and the office was established the following year. In 1870 a similar Bill had been introduced by the Colonial Treasurer, Mr. Vogel (afterwards Sir Julius Vogel), and had been passed by the House of Representatives, but had been thrown out by the Legislative Council. The credit of having originated a scheme which has developed in New Zealand into a State institution of unsurpassed importance, and which has been adopted with success in other portions of the Empire, is due not only to the Minister of the Crown whose name has been already mentioned, but to another veteran of New Zealand's Parliamentary Service, the late Hon. E. C. J. Stevens, who was then a member of the House of Representatives, and afterwards (from 1882 to the time of his death in 1915) a valued member of the Legislative Council. In "moving" the Bill in 1870 and repeatedly on other occasions, the Colonial Treasurer acknowledged that it was Mr. Stevens who had first suggested to him the idea, and by his arguments had convinced him of the wisdom of establishing a Public Trust Office. In his speech on the Second Reading of the Bill of 1870, Mr. Vogel stated in the following terms the reasons which had led to its introduction:

> It must be borne in mind that in a country like this the want of a Public Trustee was felt to a much greater degree than in older countries, where there are comparatively a much larger number of persons who were able to undertake the responsibility of trusteeship.
>
> Honourable members must be aware that it was very difficult to obtain trustees for wives and children, or executors under wills, *with sufficient time at their disposal to do justice to the task;* and even when, after some difficulty, and a great sacrifice to friendship, such trustees were obtained, no one could be sure that, in the case of death or removal, their place would be well supplied. In many cases very large and important trusts devolved upon a sole trustee through the failure of others who had been appointed to act with him. . . . It was not an uncommon occurrence that persons who had the sole and undivided control of trust estates were tempted, in moments of difficulty, to make only temporary use, as they intended, of the money, and then, little by little, they continued to betray their trusts, until the saddest results followed to the persons who were interested. Innumerable cases had occurred in the colonies where

> minors believed that they would come into large properties on attaining their majority, but found when that time arrived that the trustees had made away with the same, and that they were almost penniless. That was a history of such frequent occurrence that many wealthy colonists realised their properties because they could not satisfy themselves that they could will them away with security to their children.

From this and from similar utterances by public men of the day, it may be gathered that one of the principal reasons which led to the establishment of the Public Trust Office in New Zealand was the difficulty of securing private trustees of knowledge and integrity with sufficient leisure to devote to the duties of their trust. Another, but less potent, reason was the expenses of transfer from time to time involved in the case of large and complicated estates, when occasion arose for changing trustees.

Objections to the Office.—It may be here fittingly observed that even in these early days an objection, which has been magnified in later days, was raised to the policy of the proposed measure, in so far as it related to private trusts. Speaking of the Bill on its reintroduction in 1872, one member said:

> There might be some advantage in having a Public Trustee to have the care of all *public* trusts, and a saving might thereby be effected, but the idea of placing *private* trusts in the hands of one individual, residing in one part of the Colony, was to him purely a chimera. No man of property in his sober senses would leave his property to be dealt with by a trustee residing in a different part of the Colony, who could have no opportunity of personally looking after the estate.

Original Powers of Public Trustee.—The main features of the Act of 1872 are provisions for the following matters:

(1) The establishment of a Public Trust Office, to be presided over by an officer called "the Public Trustee" to be appointed by the Governor acting in the name and on behalf of the Sovereign, to hold office during good behaviour, and to be removable from office only on an address from both Houses of Parliament praying for such removal. This provision as to tenure of office remained in force until 1891, in which year an amending Act was passed declaring that the Public Trustee should hold office during pleasure, and on the same terms and conditions as other officers of the Civil Service.

(2) The constitution of the Public Trustee a corporation sole, with perpetual succession and a seal of office.

(3) Authority for private persons, for public or other companies or associations, and for charitable or other public bodies within or outside New Zealand to place any property belonging to or vested in them, or within their lawful custody or control, in the Public Trust Office, " by deed or will conveying, devising, or otherwise vesting such property to the Public Trustee alone, upon the trust and for the uses and with the powers in such deed or will expressed, and defining the nature and extent of the powers intended to be vested in the Public Trustee in respect of such property." The acceptance of any such trust was not made obligatory on the Public Trustee but was within the discretion of a Board of Advice, known as the Public Trust Office Board.

(4) The payment into a special bank account, known as the Public Trustee's Account, of all moneys being part of or accruing out of property placed in the Public Trust Office, and the investment of moneys in that account in securities to be approved by the Board. Except as otherwise provided by the particular trusts affecting any trust property, all such moneys were to be invested in securities of the Government of the United Kingdom or of any of the Australasian Colonies. Investments were made separately of the moneys belonging to each estate and the income derived from securities was appropriated accordingly to the several estates represented.[1]

Administration of Estates.—In the following year (1873) the functions of the Public Trustee were considerably extended. Several Acts relating to the administration of the estates of (*a*) persons dying intestate and (*b*) persons becoming lunatic were repealed, and, subject to certain exceptions, the administration of such estates was placed in the hands of the Public Trustee. In the case of intestate estates, the Public Trustee took over the administration of all estates then in course of administration by certain public officers known as " Curators of the Estates of Deceased Persons," and also became entitled to apply to the proper Court for authority to administer the estates of persons dying intestate after the passing of the amending legislation, in cases where no other person within New Zealand was entitled to claim the administration of the estate. The property of any such estate was deemed to be "placed in the Public Trust Office" and the provisions of the Act of 1872 as to investment of funds applied accordingly. Where the value of an estate was less than £50, the Public Trustee could "elect" to administer the estate without application to the Court for authority so to do, and upon such election the property became vested accordingly in the Public Trustee. In 1885 this limit of £50 was extended to £100; in 1891 it was further extended to £250; and finally, in 1913, the limit was fixed at £400.[1]

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[1] The practice of investing separately the moneys belonging to the several trust estates in the office continued until 1891, when the " common fund " was established.

In the case of "lunatic patients," the Act of 1873 imposed on the Public Trustee an obligation—

> to take possession and care of, receive, collect, preserve, and administer . . . the property and estates of every lunatic patient of whose estate no committee shall have been appointed.

All such property and estates were deemed accordingly to have been "placed in the Public Trust Office."

Transfer of Trusts.—The functions of the Public Trustee were further extended in 1876, in which year trustees were, subject to certain conditions, authorised to place the trust property in the Public Trust Office. The conditions precedent to such a transfer were:

(1) That such of the beneficiaries under the trust as were not under disability and were in New Zealand should consent;

(2) That, in the case of beneficiaries who may be out of New Zealand or under disability, a Judge of the Supreme Court should be satisfied that the proposed transfer would be for the advantage of the trust property. In each case the transfer of the trust was effected by an Order of the Supreme Court.

Commission of Inquiry, 1891.—No radical change in the functions of the Public Trustee or in the administration of the office was made between 1876 and 1891. In February of that year a Commission under the hand of the Earl of Onslow, the then Governor of New Zealand, was appointed to inquire into the conduct of the Public Trust Office. An amending Act passed in the same year was one of the results of the findings of the Commission. The recital to the Commission reads as follows:

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[1] In the case of testate estates valued at less than £400 the Public Trustee may file in the Supreme Court an election to administer in lieu of obtaining probate.

> Whereas the Public Trust Office of the Colony of New Zealand, as constituted under the Public Trust Office Act, 1872, and its amendments, has grown to be a department of public importance, and the business thereof has greatly increased, and in order that the constitution and working thereof may be improved and made more suitable to the public needs, it is expedient that a Commission should issue for the purpose of making full inquiry into the several matters and things hereinafter mentioned.

The matters submitted to the Commission for its consideration were briefly as follows:

1. The mode of conducting the business of the office;
2. The powers, duties, and liabilities of the Public Trustee, his officers and agents;
3. The investment of trust and other funds; and
4. The necessity or otherwise of amending the existing law.

Act of 1891.—The practical result of the inquiry was the enactment of the Public Trust Office Acts Amendment Act, 1891. The main features of this amendment were as follows:

(1) The provision of the principal Act which continued the Public Trustee in office "during good behaviour" was repealed, and the status of that office became the same in all respects as that of other responsible officers of the Public Service (that is, he became responsible in the first instance to the Government of the day instead of to Parliament).

(2) The "common fund" was established, into which were made payable "all moneys in the Public Trustee's Account from whatever property arising, and for the investment of which no direction is given by or under the statute or instrument by which such property has heretofore been or may hereafter be placed in the Public Trust Office."

The establishment of this common fund constituted a radical change in the scheme of the office. Prior to the 1891 Act, the funds belonging to the several estates and available for investment retained in the office their separate identities; the only possibility of their amalgamation in the course of investment was by a system of contributory mortgages. Under this system, moneys belonging to more than one estate had, without specific legal authority, been brought together for the purpose of investment and the interest accruing from the securities was duly apportioned among the several estates represented.

On the establishment of the common fund, investments were made in the name of the Public Trustee, and interest accruing from investments became in turn part of the common fund. Beneficiaries ceased to be immediately concerned in the mode of investment; interest at a rate to be from time to time fixed by the Governor in Council became payable to the several estates represented by the fund, and any surplus accruing from the investment of the fund became the property of the Crown. For the first time in the history of the office the operations of the Public Trustee were now guaranteed by the State. The provisions as to payment into a common fund did not apply in cases where special investments (not being securities in which the common fund could be invested) were directed by the instrument creating the trust; such special investments were not entitled to the protection afforded by the State guarantee.

From a beneficiary's viewpoint, the common fund afforded two advantages, viz.:

(1) Moneys were interest-bearing from the date of their payment into the common fund, and failure on the part of the Public Trustee to invest the common fund did not adversely affect the beneficiary;

(2) The interest of the beneficiary both in the capital moneys of the trust estate and in the interest accruing therefrom was guaranteed by the State.

The classes of securities in which trust moneys might properly be invested were extended, and, in addition to Government securities, the Public Trustee was authorised to invest in debentures issued by local authorities, in mortgages of real estate, and by way of fixed deposits with approved banking institutions.

Amending Legislation.—Further amending legislation was passed in 1893. The provisions of the Act then passed related particularly to matters concerning the practical administration of the office, and did not confer additional functions of importance on the Public Trustee. In the following year (1894) the original Act of 1872 and its numerous amendments were repealed, and their provisions were re-enacted, without substantial amendment, in the Public Trust Office Consolidation Act, 1894.

Further amending legislation was passed in 1895, 1901, and 1905, but in none of the Acts then passed were the functions of the Public Trustee substantially enlarged. In 1907 extensive powers were conferred on him with respect to what was referred to as "uncared-for property," that is, property the owner of which, being absent from New Zealand, had left no agent in New Zealand with authority to administer such property; or property the owner of which may be unknown, or whose whereabouts may be unknown.

The Public Trustee was directed to hold in trust for the owner of such property all moneys received by him in the course of administration, after payment of all expenses connected therewith.

The Acts relating to the Public Trust Office were again consolidated in 1908, when the Consolidation Commissioners appointed under the Reprint of Statutes Act, 1895, completed their task of consolidating the public general statutes of New Zealand.

The Act then passed (the Public Trust Office Act, 1908) is still in force, and has been amended in 1912 and 1913. The Consolidated Act (1908) purports to be a reproduction without amendment of the Acts which are repealed by it, the principal features of which have already been sufficiently alluded to.

Local Deputy Public Trustees.—In 1912 statutory provision was made for the appointment of not more than four officers to be known as "Local Deputy Public Trustees." Until the appointment of these officers the whole of the work of the Public Trustee was directed from Wellington, where the head office is situated. On more than one occasion in the history of the office an objection to the extension of the functions of the Public Trustee had been based on the fact that the Public Trustee, with headquarters in Wellington, may be called upon to administer estates situated in the northern or southern extremities of the colony; estates that he had never seen, in districts of which he had and could have no real knowledge. As a matter of practice the difficulty was avoided by the establishment throughout the country of district offices, and the appointment of local agents, who, in all the practical matters of administration, acted for and advised the Public Trustee. Nevertheless the fact that the Public Trustee was the only official recognised in law necessarily entailed a considerable delay in the administration of estates. It was to avoid this delay that in 1912 the change was made authorising the appointment of Local Deputy Public Trustees. To these officers respectively the Public Trustee has power by writing under his hand to delegate such of his functions, powers, and duties as he may think fit. In particular a Local Deputy has power to execute deeds and other legal instruments, such instruments being signed thus:

"The Public Trustee
By A. B.
Local Deputy Public Trustee at [*e.g. Auckland*]."

In practice, the Public Trustee delegates to his Local Deputies the administration of all estates the value of which does not exceed a certain departmentally fixed limit, and may delegate other more valuable estates if the realisation presents no practical difficulties. The Local Deputies have, however, ready access to the Public Trustee for guidance and advice in all matters of difficulty that may occur in the course of their duties.

By delegation to a Local Deputy, the Public Trustee is not relieved of his sense of responsibility, for the Local Deputies are required from time to time to report to the head office the progress of administration, and to render a final statement when the duty of administration has been completed.

In addition to the provisions as to Local Deputies, the Amending Act of 1912 extended the powers of the Public Trustee—

(*a*) By authorising him, in the course of the administration of any intestate estate in which any infant may be entitled, to make periodical payments, not exceeding £80 a year, towards the maintenance, education, or advancement of such infant.

(*b*) By authorising him to make advances to beneficiaries not exceeding half the estimated value of their share of any estate in the Public Trust Office.

Any such advance constitutes a first charge on the share of the person to whom it is made.

Relief Funds.—The Act of 1912 also enabled the Public Trustee, on request, to undertake the administration of a class of funds (that may be called "benefit" or "relief" funds) from time to time raised by public or private subscriptions for the relief of persons in distressed circumstances. Funds of this class have hitherto been administered by private individuals willing to undertake the duties of trustee.

Advisory Board.—The latest amendment to the long series of Public Trust Office Acts was passed in 1913, when extensive alterations and additions to the law were made. The Advisory Board (known as the Public Trust Office Board) was reconstituted, and in addition to a Minister of the Crown, the Public Trustee, and three other Government officers of high standing, provision was made for strengthening the Board by the appointment of two other members, not being public servants. The object of including in the Board persons outside the ordinary public service was to secure the benefit of the knowledge and experience of men of wider commercial and business training. The functions of the Board relate principally to the acceptance or rejection of trusts and to matters of investment. It determines (within the statutory limits) in what classes of securities investments may be made and also considers the sufficiency or otherwise of the actual securities offered. In a general way also it determines the policy of the office.

By the 1913 amendment provision was also made for the appointment—

(*a*) Of "advisory trustees" to assist the Public Trustee in the administration of an estate being or to be administered by him; and

(*b*) For the appointment of the Public Trustee as "custodian trustee" to act in conjunction with "managing trustees."

As the several titles imply, where "advisory trustees" are appointed, the administration of the estate remains in the hands of the Public Trustee, but he has the privilege of looking to his advisory trustees for assistance and guidance in matters of policy or in matters involving questions of unusual difficulty; where the Public Trustee is appointed "custodian trustee" only, he is freed from the practical duties of administration, and his sole duty is "to get in and hold the trust property, and invest its funds, and dispose of the assets, *as the managing trustees in writing direct.*" Only to a very limited extent has advantage yet been taken by the public of these provisions as to advisory and custodian trustees.

Further protection to the interests of beneficiaries in estates administered by the Public Trustee is afforded by s. 11 of the Act of 1913, which enables any such beneficiary to require an investigation and audit of the affairs and accounts of the trust to be made on his behalf by any solicitor or registered accountant.

Miscellaneous Functions.—In addition to the many duties and powers imposed and conferred on the Public Trustee by the Acts which have been already considered, numerous other functions have been from time to time conferred on him by Acts not relating specially to the Public Trust Office. Without attempting an exhaustive enumeration of these extraneous duties and powers, the following examples may be cited:

1. The Public Trustee is charged with the administration of numerous reservations of native land. His duties comprise the leasing of the reserves, the collection of rents, and the distribution of such rents among the persons entitled. On March 31, 1915, the total estimated capital value of the native reserves being then administered by the Public Trustee was £1,370,000. In addition, the Public Trustee is charged, by Order of the Native Land Court, with the control of the estates of native minors and other native persons under disability. In 1915 the total value of such estates exceeded £100,000.

2. By virtue of the Local Bodies' Loans Act, 1913, the Public Trustee is Commissioner of Sinking Funds for all loans raised by local authorities from any Government Department and may be appointed by any local authority as Commissioner in respect of loans raised by it elsewhere.

3. The several Superannuation Funds established in connection with various public services (viz. the Teachers' Superannuation Fund, the Government Railways Superannuation Fund, and the Public Service Superannuation Fund) have hitherto been invested by the Public Trustee. Recently, the investment of the Public Service Superannuation Fund has been undertaken by a separate Board. The moneys belonging to the several funds have been paid into the Public Trustee's "common fund" and have been from time to time credited with interest at the common fund rate; the interest accruing on actual investments has been paid to the Public Trustee's Account.

4. The National Provident Fund, established by the National Provident Fund Act, 1910 (a fund guaranteed and subsidised by the State, and established to encourage the making of provision against destitution arising from old-age, sickness, widowhood, and

orphanage), is vested in the Public Trustee, who is required to invest all moneys therein not immediately required for the payment of benefits provided for by the Act.

5. Under the Land Settlement Finance Act, 1909, the Public Trustee is appointed the agent of associations incorporated under that Act for the purpose of enabling the members of such associations to acquire land for their own use. These associations are supported by the State guarantee. At the close of the financial year ended March 31, 1915, the Public Trustee was acting as agent for forty-four such associations, with respect to estates of an aggregate value of £566,046.

Authoritative Opinion of the Office.—Referring briefly to the functions of the Public Trust Office as at present constituted, I quote the words of a Commission of Inquiry appointed by the Government in 1912, to inquire into and report upon the working of the office, as follows:

> Broadly speaking, the functions of the Public Trustee come under two distinct categories, namely (1) those relating to the management and realisation of estates, and (2) those relating to the investment of trust funds. Under the management of estates come such multifarious business as letting, supervising tenants, repairs, sales, carrying on business pending sale, and suchlike. Under the same head come the distribution of income, and the fixing and payment of maintenance for infants.
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> The investment of trust funds applies not only to moneys forming part of or derived from the realisation of estates and not requiring to be immediately distributed, but also to the large sums annually received on account of superannuation, sinking, and many other classes of public funds.

In the report of an earlier Commission of the same year, appointed to inquire generally as to the working of the several Departments of the public service (including the Public Trust Office), in referring to the work of that office, the following remark is found :

> While this Department is doing very fine work, and has to our mind a great sphere of usefulness ahead of it, its weak spot at present is, we think, the manner in which it realises estates that come into its hands. When once the estates that it handles are realised and the Department has the cash in hand to invest, its methods are admirable. . . .

To this reflection on the methods of realisation adopted by the office, the Public Trustee, in an official memorandum (since published with the report of the Commission) took strong exception. He pointed out that in the course of their inquiry the Commissioners had not raised any question as to the efficiency of the office methods of realising estates, and that had they done so "it could have been conclusively shown not only that the realisations are successful, but that the office possesses advantages which private trustees cannot possibly have."

The later Commission, dealing specifically with the Public Trust Office, in reporting as to the efficiency of administration, with respect both to realisation and management, observed that—

> the practical work of administering estates, as regards their realisation and management, is necessarily in the hands of District Managers and agents controlled by the head office, and the efficiency with regard to each estate must be dependent upon and vary according to the business capacity, judgment, and energy of the individual manager or agent.

The fact that a steadily increasing amount of business is, year by year, being *voluntarily* placed in charge of the office was regarded by the Commission as sufficient evidence that the work of the office was well esteemed by the public for whom the office existed.

The following statistics, taken from the latest official report of the office, indicate the rapid development of the office during the last few years:

Year ended March 31.	No. on Staff.	Salaries of Staff.	No. of Estates.	Value of Estates.	No. of Wills deposited during year.	Capital Funds.	Net Profits.
		£		£		£	£
1909 . .	103	15,772	5,019	6,399,567	718	2,850,111	10,850
1910 . .	112	16,807	5,564	7,358,947	844	3,414,168	11,738
1911 . .	138	18,444	6,112	8,112,342	993	4,287,195	11,241
1912 . .	160	21,722	6,694	9,493,959	1,024	5,070,305	25,919
1913 . .	182	27,221	8,496	11,268,311	1,035	5,799,446	27,551
1914 . .	206	32,837	9,223	12,282,883	1,047	6,366,707	29,222
1915 . .	237	35,219	9,989	13,580,936	1,572	7,096,420	32,508

The office has its own staff of legal officers comprising, at the present time, an office solicitor and three assistant solicitors. Speaking generally, the functions of the legal staff are to advise the Public Trustee on questions arising in the course of his duties; to prepare conveyance, transfers, mortgages and other documents required in the course of the administration of estates or the investment of funds by the Public Trustee; to draft wills at the request of testators purposing to place their estates in the hands of the Public Trustee as executor; and to appear in Court, principally on *ex parte* matters arising in the office.

The development of the office has not been wholly free from friction with outside interests. More particularly has this been the case with respect to the legal profession. To such an extent had this state of friction developed that in the report of the Commission appointed in 1912 to inquire into the state of the office, the Commissioners report that it was demonstrated to them, and freely acknowledged by the Public Trustee, that a "spirit of hostility" had sprung up between the Public Trustee and the legal profession. The Commissioners attributed the growth of this spirit to the "zeal" of the Public Trustee and his agents to attract business to the office. There seems to be a danger that the value of the services rendered to the community by the office may be minimised, not by the Public Trustee's zeal for attracting to the office more work than can be adequately undertaken, but by the habit of the Legislature for its own convenience of imposing on the Public Trustee offices and functions not intimately connected with the business of a trustee.

SOUTH AUSTRALIA AND NEW SOUTH WALES.

[*Contributed by* W. Wright, Esq., *Public Trustee of South Australia.*]

During the progress of recent legislation in the State of South Australia, attention has been frequently called to the varied duties, responsibilities, and functions of the Public Trustee, and the gradual growth of his office in various directions.

In the year 1880 a Bill was introduced by the late Sir Henry Bundey, then Attorney-General, but more recently a Judge of the Supreme Court, and the Act[1] under which the office of Public Trustee was established came into operation on January 1, 1881.

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[1] The subsequent Acts relating wholly or partly to this Department are as follows: Acts 277 of 1882, 354 of 1885, 486 of 1890, 514 of 1891, 537 of 1891, 739 of 1900, 816 of 1903, 854 of 1904, 914 of 1906, 586 of 1907, 1053 of 1911, 1122 of 1913, 1159 of 1914, 1174 of 1914 and three private Acts passed in the years 1885 and 1910.

Original Objects.—The objects the author of this measure had in view were threefold, namely, the safe and economical administration of the estates of deceased persons, the protection of the infants and absentees, and the release within reasonable time of sureties under bonds given to secure the due administration of estates. The Office of Curator of Intestate Estates was abolished by this Act, and the work was taken over by the Public Trustee.

Under the numerous amending Acts the powers and duties of the Public Trustee were extended, and may now be summarised as follows:

Administration of Estates.—The Public Trustee may by order of the Court administer estates in the following cases:

(*a*) When the deceased shall have died intestate without leaving a widow, husband, or lawful next-of-kin in the State.

(*b*) When the widow, husband, or next-of-kin of the deceased desires the Public Trustee to administer.

(*c*) When the deceased by his will has appointed the Public Trustee executor of his will.

(*d*) When the executor, trustee, or administrator desires to retire or to have the Public Trustee appointed.

(*e*) When the deceased shall have died insolvent or when a creditor would be entitled to apply for administration.

(*f*) Pending any action relating to the estate of a deceased person the Public Trustee may be appointed *pendente lite*.

(*g*) An absentee by power of attorney may appoint the Public Trustee to administer.

(*h*) The Public Trustee may receive from an executor or trustee any money or property and administer same subject to the trusts of the will.

General Trusts.—The Public Trustee may be appointed to receive and administer any money or property held by any person in trust for any purpose (not being exclusively a religious purpose) however the trust may have been created.

Under the Workmen's Compensation Act the Public Trustee receives and invests for the benefit of widows and orphan dependants sums awarded by the Court, and disburses same as the Court may direct. He also claims and acts generally on behalf of absentee dependants.

He may be appointed guardian of the estates and persons of infants and as guardian *ad litem* or next friend of infants when appointed by the Court.

Under the Mental Defectives Act, 1913, the Public Trustee has the custody and administration of the estates of patients in the Mental Hospital, and may be appointed committee of such patients when necessary, and of persons who are found to be mentally defective, but not committed to the above institution. If any case where a person other than the Public Trustee applies to be appointed committee under this Act, the Court has to be satisfied that there is some sufficient reason why such person should be appointed in preference to the Public Trustee.

As curator of convicts' estates the Public Trustee administers them under the provisions of the Treason and Felony Forfeiture Act, 1867.

Private trustee and executor companies are required to deposit security with the Public Trustee, and also life insurance companies carrying on business in the State, who have to deposit up to a maximum of £20,000. Administrators' bonds are given to the Public Trustee. Wills of persons appointing the Public Trustee executor can be deposited.

Administrators are required to file accounts with the Public Trustee, and to pay to him the shares of minors and absentees. Accounts of executors and trustees are audited if required by beneficiaries, at their expense. All life insurance companies' reports, balance sheets, and actuarial reports are submitted to the Public Trustee, whose duty it is to see that the requirements of the Life Assurance Companies Act are complied with.

Charges and Commission.—The scale of charges for realising the property in an estate is as follows: *On Capital*—Not exceeding £10,000, 2½ per cent.; for excess over £10,000, 1 per cent. *On Income*—for collecting rents, interest, dividends and profits: for the first £500, 5 per cent.; over the first £500, 2½ per cent.; for investment of money, nil.

On property not realised but transferred in specie, a charge of about 1 per cent. is usually made. The Public Trustee may, with the approval of a judge, fix the commission on estates at a less rate than the above, or he may refrain from charging commission.

Judicial Advisers.—Under Act 188 of 1880 the Public Trustee had the assistance of a Board of Advice, but this provision was repealed in 1885, and since that date their Honours the judges of the Supreme Court give advice or direction in all matters in which the Public Trustee has doubt or difficulty. A very convenient method has been adopted so that the advice or direction of a judge may be obtained in small cases without legal formality and at a very small expense. The Public Trustee is a corporation sole, so that when once appointed no further changes of trusteeship arise, and the accompanying expense is avoided.

Banking.—The State Treasury acts as the banker of the Public Trustee, all money received being paid into a current account against which cheques are drawn, interest being allowed at current Savings Bank rates upon the daily credit balance.

Administration of Estates.—The administration of so many classes of estates involves the management of a great variety of businesses, including the carrying on of farms, sheep stations, hotels, and other businesses. In many instances the power, with the approval of a judge, to carry on the business of the deceased has proved of great advantage to the persons interested. A very typical case is where a struggling farmer dies intestate, leaving a widow and family of minors and no estate beyond his farm, usually mortgaged, and the ordinary farm stocks and implements. The minors' two-thirds of the estate, if realised upon immediately, would amount often to no more than £300 or £400, a sum probably insufficient to maintain the minors during infancy. Upon it being shown that she is a competent manager, the widow is frequently allowed, during the minority of the children, and with the assistance of the elder ones, to carry on the farm under the supervision of the Public Trustee. By this means a home is preserved for the family, and the children are maintained, and when they become *sui juris* the children usually make a family arrangement with their mother. Even if the property has then to be sold, its value is rarely less than at the date of the intestate's death, but frequently, or it might even be said usually, greater.

Another frequent course in such cases is to allow the widow to purchase the estate at a valuation, and take from her security for the minors' shares in the shape of a mortgage or a second mortgage, as the case may require, over the farm, she not being required to pay any interest while she maintains the infants.

Police as Agents.—The local police in all parts of the State act as agents for the Public Trustee, and protect the estates of persons dying without relations. They also supply valuable information which is of great advantage to the Department in administering the estates and tracing the relations.

Every effort is made by the Public Trustee to trace the beneficiaries in cases when the deceased has died and his relations are unknown, and in most cases the advertisements and inquiries made are successful. For instance, in 1912 a lady died intestate, and nothing was known of her relations. The Public Trustee took immediate steps to protect the property, and when the estate was realised, he had a balance for distribution of over £4,300. The deceased had once mentioned to a friend many years ago that when she was a little girl she used to play in the fields of "Quaker Lloyd" at Birmingham. This was the only clue the Public Trustee had, but inquiries were made, and an advertisement in the Birmingham papers resulted in tracing a sister and other relations of the deceased, whose claims have been admitted.

Administration.—The revenue of the State is responsible for all moneys coming into the hands of the Public Trustee, and every effort is made to administer estates to the best advantage and at the least possible expense. The strictest secrecy is observed by all officers of the Department with respect to all confidential matters. In all cases the wishes of the relatives and beneficiaries are considered, and the family solicitor is retained to act for the Department.

The gradual growth of the business of the Department in all its branches is an evidence of the appreciation of the public, and the legal profession recommend their clients, in many cases, to appoint the Public Trustee as executor.

The number of estates in the hands of the Public Trustee on December 31, 1914, was 1,178, and the total amount standing to the credit of estates and companies exceeded £750,000.

New South Wales is the only other State in the Commonwealth that has established a Public Trustee. The Act was passed in 1913. The powers are not quite so wide as those described above, but already an extension is being considered.

ENGLAND.

[*Contributed by* D. H. PETTITT, ESQ.]

Judicial Trustees.—The first statutory enactment to deal with the subject of an official trustee for private trusts is the Judicial Trustee Act, 1896. That Act gives power to the Court to appoint a Judicial Trustee; but it does not create an office; or, at all events, (what is more important) it does not provide an officer. In each case in which the appointment of a Judicial Trustee is desired, a person has to be found for the purpose and specially appointed to the office. The appointment can only be made by the Court. The application for the appointment may be made by the person creating the trust, or by any trustee of or beneficiary under the trust. A Judicial Trustee may also be appointed an executor or administrator of the property of a deceased person. Perhaps the most important provisions of the Act are those which provide for the accounts of a Judicial Trustee to be audited once a year, and reported upon to the Court; and the power conferred upon the Court to require a Judicial Trustee, when not an official of the Court, to give security for the due application of the trust property; a provision which, it is to be noted, does not of itself require security to be given, but only confers upon the Court the power to order it. The Act also gives power for rules to be made relating, among other things, to the safety of the trust property and the application thereof. But here again, it will be observed that the Act makes no definite provision for the custody of the trust property as of general application, but only confers upon the Court a power which may or may not be exercised.

It is hardly surprising to find that as a means of filling the office of trustee, the Judicial Trustee Act [1] has remained almost a dead letter. The necessity for an application to the Court for the appointment of the Judicial Trustee, and for the giving of security for the safety of the trust property, are obstacles in the way of the practical usefulness of the Act. Still more so, perhaps, is the absence of any provision in the Act creating the holder of the office of Judicial Trustee a corporation sole, a provision which would have invested the office with perpetual succession. In the absence of such a provision the Act does nothing to prevent the trouble and expense attendant upon the appointment of new trustees, the necessity of which must from time to time occur when the office of trustee is vacated by the retirement or death of the person holding it. The Act had a clear ten years free from competition of any kind, and it cannot be said that it made any approach towards fulfilling its purpose as a means of providing the public with a trustee.

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[1] 6 & 7 Ed. VII. c. 13.

The Office of Public Trustee.—Thus the time was fully ripe when in 1906 the Public Trustee Act [1] was passed, and January 1, 1908, was fixed as the date on which it should come into operation. A glance at the provisions of the Act is sufficient to show how far it improves upon the attempt which was made by the Judicial Trustee Act of 1896. In the first place the Public Trustee Act establishes a definite office held by a definite and permanent public official called the "Public Trustee"; and the holder of that office is a corporation sole with perpetual succession. Thus where the Public Trustee is appointed there is no possibility of any vacancy or change in the office of trustee, and consequently no necessity for the trouble or expense of the appointment of any new trustee. The Public Trustee may act either alone or jointly with another or other trustees, and he may act as an ordinary trustee or as a custodian trustee. He may also be appointed a Judicial Trustee, or the administrator of the property of a convict under the Forfeiture Act of 1870, or executor of a will or administrator under an intestacy; and where estates of a value of less than £1,000 are concerned, and the persons beneficially entitled are persons of small means, the Public Trustee may, on the application of the person entitled to apply to the Court for an Administration Order, administer the estate, and he is obliged to do so unless he sees good reason for refusing. In fact, the Act carries this part of the Public Trustee's duties still further. It enables the Court of its own initiative to order an estate to be administered by the Public Trustee in all cases where administration proceedings have been instituted, and where by reason of the small value of the estate or for any other reason it is expedient that the estate should be so administered. No definite limit is fixed as to the size of the estate, nor is the smallness of the estate the only ground on which the discretion of the Court may be exercised.

In all trusts in which the Public Trustee acts he may do so notwithstanding the fact that he is the sole trustee, and in this respect he differs from private trustees, who may not be less than two in number unless the trust instrument expressly authorises a sole trustee to act.

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[1] 6 & 7 Ed. VII. c. 13.

Limitations upon and Exclusions from Powers.—There are certain limitations upon and exclusions from the trusts undertaken by the Public Trustee, but these do not affect the great body of trusts arising under wills and settlements. It is for these latter trusts the office of Public Trustee is primarily intended, and it is of such that the work of the department mainly consists. Such trusts are many in number, widely diverse in value, large in their aggregate amount, and often the sole source of income of those who by reason of youth, age, infirmity, or inexperience are the least able to look after their own affairs. Accordingly the Public Trustee may not decline to accept any trust on the ground only of the small value of the trust property, and the trusts which he may and which it is his duty to accept are only limited by the negative process of excluding those classes of trusts which are not within the intention of his office (s. 2 (5))—such, for instance, as trusts of a religious or charitable[1] character (generally spoken of as public trusts); trusts arising under deeds of arrangement for the benefit of creditors (s. 2 (4)); and the administration of any estate known or believed by the Public Trustee to be insolvent, a provision which wisely guards against the office being in any way used for the purpose of an Official Receiver or Trustee in Bankruptcy. There is a prohibition also against the acceptance of any trust which involves the management or carrying on of any business (s. 2 (4)); but this prohibition, unlike those just referred to, is not absolute in its character, and may be relaxed by rules made under the Act. The appointment of the Public Trustee may also be excluded by the author of any trust whether by will, settlement, or other instrument (s. 5 (3)); but here again the disability on the part of the Public Trustee may be removed by order of the Court. A more general power is that which enables the Public Trustee to decline, either absolutely or except on condition, toaccept any trust (s. 2 (3)); but this power, though wide in its terms, is obviously and necessarily limited to a discretionary and judicial application in effect. It is a necessary safeguard against the Public Trustee being forced into such trusts as sometimes give rise to questions between a settlor and his creditors; or against any other objectionable class of trust the risk of which the Legislature did not think could be satisfactorily guarded against by express definition.

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[1] By this expression is meant those trusts which are regarded by the Chancery Division of the High Court of Justice as "charitable;" and comprise the charitable uses specified in the Mortmain and Charitable Uses Act, 1888, and the earlier statute 43 Eliz. c. 4, and those uses which the Courts have at various times held to be charitable uses within the "spirit and intendment" of those Acts. The expression does not include objects which (although charitable in a popular sense) are merely for the benefit of individuals. See Snell's *Principles of Equity*, 17th ed. pp. 92, 93.

Custodian Trustee.—The position of custodian trustee gives to the Public Trustee the custody of the trust property whilst leaving its management and the exercise of any power or discretion in the other (*i.e.* the managing) trustees (s. 4). Where the Public Trustee acts as custodian trustee, he has the custody of all the trust securities, and all payments to or out of income or capital are paid to or by him; but he may allow payments to be made to or as directed by the managing trustees, and the Public Trustee is in that case exonerated from seeing to the application of the trust moneys so dealt with, and is not answerable for any loss or misapplication. A custodian trustee is not reckoned for the purpose of making up the number of trustees necessary for the purpose of the trust, so that at least two managing trustees are always necessary, unless the trust instrument should especially empower only one such trustee to act.

State Guarantee of Funds.—A qualified, but nevertheless valuable, security is provided by the Act for trust funds in the hands of the Public Trustee, by making the Consolidated Fund of the United Kingdom liable to make good all sums required to discharge any liability which the Public Trustee, if he were a private trustee, would be personally liable to discharge, except where the liability is one to which neither the Public Trustee nor any of his officers has in any way contributed, and which neither he nor his officers could by the exercise of reasonable diligence have averted (s. 7). This is far short of providing an insurance for the trust property, and it would have been more satisfactory if the Act had gone further in this direction. There is a quite sufficient precedent for such a course in the insurance fund provided for by the Land Transfer Act of 1897, and the need for such a provision cannot be said to be less in the case of the administration of the trust property than it is in a system of land registration. But even the qualified security given by the Act has the advantage of giving a charge on the Consolidated

Fund. The class of security given is, therefore, unassailable, but its application is restricted, for it is clear that the Consolidated Fund will not be liable where there would be no liability on the part of a private trustee. According to the well-known rule of *Speight* v. *Gaunt*[1] a trustee may employ agents, brokers and others in case of moral necessity, or in the usual course of business, without (in the absence of negligence or default) becoming liable for losses. The practice of the employment of such agents is usual and proper. Indeed it is often necessary when realisation of trust funds or changes of investments take place; but the Act gives no protection to the trust funds against loss arising out of such transactions. It ought not to be difficult to devise some system by means of which security shall be given by brokers and other agents through whose hands trust funds have to pass. It is quite clear that if trust funds are to run the risk of loss under a system of Public Trusteeship the value of such a system as against that of ordinary private trusteeships is proportionately diminished, and where the State assumes the rôle and character of trustee there is a feeling that the State should also undertake full responsibility.

Investments.—The question of investments is necessarily one of great importance in a department having the control of such large funds, and in the year 1914 an Advisory Committee was appointed for the purpose of assisting the Public Trustee on the choice of investments. The wisdom and advantage of such a course is beyond doubt.

Trustee for Infants and Lunatics.—The King's Bench Division of the Court finds the office of Public Trustee of value in that large class of case where money becomes payable to infants or persons of unsound mind. That division of the High Court necessarily deals with many cases where personal injuries, or loss suffered from the death of a parent or other relative through accident, often give rise to an action under which an infant or a person of unsound mind becomes entitled to a sum of money. By far the greater number of such cases are those in which poor people are concerned. Sometimes they are children who have themselves sustained personal injuries, sometimes their claim is for the death of a parent on whom they were dependent. Until recently, money which became payable to infants or persons of unsound mind under such circumstances could be paid without any provision being made for the protection of the person entitled, though that person was under the disability of infancy or mental incompetency ; but the Rules of Court[1] now provide that all money or damages so received shall, unless the Court or a judge shall otherwise direct, be paid to the Public Trustee. The safety and preservation of the money are thus secured, and the greatest care and discrimination are exercised in the Public Trustee's office to ensure the application of the money in the most advantageous manner in the interest of the infant or the person entitled. This particular class of case was probably not amongst the reasons which led to the creation of the office of Public Trustee, but the fact that his department can be utilised for such a purpose is additional testimony to its value.

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[1] L.R. 9 A.C. 1.

Voluntary System.—It must not be forgotten that the system of Public Trusteeship as regards private trusts is a purely voluntary system. Property to the value of upwards of £168,000,000 has come under the operation of the department since its commencement in 1908. During the year ending March 31, 1916, the new business amounted to £37,000,000 as compared with £23,000,000 in the previous year. The success of the Department is therefore sufficient record of its value.

Proposed Compulsory Extension.—The principle of compulsion might advantageously and quite reasonably be applied to all cases of trusteeship, to this extent : that the employment of the Public Trustee should be necessary except where, and only where, a private trustee gives sufficient security and produces evidence of fitness which shall satisfy the Court or the Public Trustee. It may be remembered that in an arrangement between debtor and creditor Parliament has imposed certain qualifications and restrictions as to the choice and conduct of the person acting as trustee ; the same thing applies to trusteeships in bankruptcy ; and the Court never appoints a receiver of any kind of property, or a committee in lunacy, without taking full security for the property passing through his hands. Besides this a trustee who acts between debtor and creditor has to furnish accounts to the Board of Trade, and various elaborate provisions are made for the audit of such accounts. If business men like debtor and creditor require the protection of the law when it becomes a matter of trusteeship between the two, how can it be said that the persons who are the objects of private trusts, and who are often quite inexperienced in business matters, stand in no need of such protection? Why should the less helpless person (like the business man) receive this protection of the law and the assistance of a Government department whilst the more helpless person (like the widow and the orphan) are left without any such protection? It is nothing less than grotesque that a man may not carry on the business of a money-lender, nor buy a house in London so as to obtain a legal title, unless in both instances he registers himself; that he may not fire a gun at a pigeon or a rabbit or ride a motor-cycle unless he first obtains a licence; but that he may, nevertheless, have the entire welfare—the very livelihood—of helpless women and children in his keeping, without showing or even possessing any fitness for the position.

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[1] Order 22, Rule 15.

Trading with the Enemy.—The services of the Public Trustee have been utilised by the legislature since the country has been at war for the purposes of the Trading with the Enemy Acts. It is, perhaps, at first sight somewhat paradoxical that a state of war should afford a fresh field of action for the exercise of such an office as that of a trustee. It is an office which is naturally associated with the idea of peace. Its mission lies along the ordinary course of life—in the preservation and just distribution of property; and property is the offspring of peace, whilst it is the victim and prey of war. But property may belong to an alien enemy, and the policy which the legislature has pursued is to prevent the payment of money to persons or bodies of persons resident or carrying on business in an enemy country, and yet to preserve such property with a view to arrangements being made at the conclusion of peace. To preserve this property in the meanwhile the services of a custodian are required, and it is to this position that the legislature has appointed the Public Trustee. Obviously it would have been necessary to create a special office for the purpose had none already existed capable of undertaking the duties, and there can be no doubt that the office of the Public Trustee is not merely capable of, but is in every way well adapted for, the discharge of the particular duties required—a further instance of the advantage of having ready to hand a public department able to deal in proper cases with private property. The Act which was passed in 1914 has been supplemented by another act, the Trading with the Enemy Amendment Act, 1915. The result of the Acts and the proclamation made thereunder is that all sums payable to enemies by way of interest, dividends, or share of profits are to be paid over to the Public Trustee as custodian, to be held by him in such manner as His Majesty by Order in Council may direct; that firms with enemy partners, and companies with enemy shareholders, have to make a return showing the capital belonging to such enemy partners or shareholders; and that persons who hold or manage property on account of enemies have to make a return thereof to the custodian. The amount of enemy income received by the Public Trustee under this arrangement amounts to a sum of upwards of £700,000, and the value of enemy property registered totals at a figure of upwards of £84,000,000. The result is to cut off large resources which would otherwise have found their way into the hands of the enemy.

The Staff of the Office.—The report issued by the Public Trustee dated March 31, 1915, contained a notification of the appointment of the staff as members of the established Civil Service. This not unnaturally raises a misgiving lest the office itself should become a mere Civil Service department. The system worked its way to success—a success which the Public Trustee points to with justifiable pride as evidenced by the fact that it has long been more than self-supporting—without the assistance of a Civil Service staff. Will the alteration in the status of the staff increase the efficiency of the office? Is it as likely to maintain that efficiency? It remains to be seen. But this much is certain. The office has to deal with living interests, with varying needs, and with practical everyday life in all grades and conditions of social, financial and personal circumstances; and it must remain a living power, able to rise to the needs of each occasion and each individual. Once let the office of the Public Trustee be led astray on to the quagmire of mere "officialism" and its popularity and usefulness will diminish in exact proportion to the depth to which it may sink. So far, there is no sign of anything of the kind. The office possesses all the vigour of a properly managed business concern, animated by a desire to give good value for the money, and not unconscious of the influence of competition. Every class of trust has its specially equipped administrative machinery and personnel. The subject of investments is dealt with by a judicious and highly expert Advisory Board, the legal business of each trust is transacted through the legal adviser who has already acted in connection with the trust, or who has been nominated by the testator or settlor for the purpose, a practice which not only confers upon the author of the trust an opportunity of giving effect to any wish he may have upon the subject, but also removes, or goes a long way towards removing, any such diversity of interest between the Public Trustee and members of the legal profession as might (either rightly or wrongly) lead to a disinclination on the part of the latter to the employment of the Department. In these, as indeed in all respects, sound business principles and active personal interest, such as are found in large and successful industrial undertakings, dominate the working of the entire system which is presided over by the Public Trustee.

EARLY JEWISH LAW AND CUSTOM.

[*Contributed by* SIR COURTENAY ILBERT, G.C.B.]

IN the course of some lectures delivered in 1913 at the Columbia University, New York, I had occasion to touch on the subject of Indian codification. I remarked on the tendency of some of the Indian codifying Acts to remain "in the air" without much practical operation, and I illustrated this tendency by an experience of my own.[1]

Indian Succession Act.—One of the codifying Acts—the Indian Succession Act—embodies substantially the rules of English law as to succession to personal property. It was framed for Indian use by a learned body of Law Commissioners sitting in England, and was carried through the Governor-General's Legislative Council in India by Sir Henry Maine, when he was Law Member of that Council. But Sir Henry Maine found that the provisions of this Act would not suit the circumstances or requirements of the most numerous and important classes in India, and was therefore compelled to make important exceptions from its application. The rules of English law as to succession to property would not suit Hindus, or Mohammedans, or Buddhists, or Sikhs, or Jains. All these classes had quite different rules of inheritance of their own, which they wished to keep, and so they had to be exempted. Nor was the law required for succession to the movable property of persons domiciled in England or elsewhere out of India. That succession was to continue to be governed by the law of the deceased person's domicile. The result was that the exceptions which had to be made from the application of the law covered almost all the propertied classes in India. These large exemptions may account for the fact that the law worked smoothly, to use Mr. Whitley Stokes's phrase, and did not give much occupation to the Courts.

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[1] I make no apology for transcribing in what follows from my lectures on the Mechanics of Law-Making. The lectures were intended mainly for American consumption, and I doubt whether they have found many readers on this side of the Atlantic.

Application to Jews.—There was, however, one class, an important, but in India not a very numerous, class, whom Sir Henry Maine persuaded to accept his Act. These were the Jews, who are always willing to accommodate themselves to the civil law of the country in which they settle, whilst remaining faithful to their own religious usages. So the Indian Succession Act of 1865 was made applicable to the Jews of British India, who are, as I have said, a comparatively small class of persons. All went well for about twenty years. The Act worked smoothly. But in or about the year 1886, while I was Law Member of the Governor-General's Council in India, an unexpected difficulty arose. Aden, the Port of Aden, though geographically situated in Arabia, is, technically, part of British India. Therefore an Act applying to the Jews of British India applies to the Jews of Aden. For some twenty years these Jews seem to have gone on in blissful ignorance of the law which had been passed for them by the Government of India in 1865. At last a case raising a question of succession among Aden Jews found its way into the Civil Court at Aden. The judge looked up his law, found that the Indian Succession Act applied, and decided accordingly. His decision very much fluttered and perturbed the Jews of Aden because it was quite at variance with their ancient customs. So they sent a deputation to the Government of India representing their grievance, and the deputation was received by me on behalf of the Government. They explained their grievance, which was that this new-fangled Act, of the existence of which they had suddenly become aware, was quite inconsistent with their old law; that the Jews of Yemen, the part of Arabia in which Aden is situated, had been under this old law for some thousands of years, that it gave them what they wanted, and that they would like to remain under it. I asked them what their old law was, and they referred me to a passage in the Pentateuch, in the Book of Numbers. Fortunately I had a copy of the Old Testament in my bookcase, close at hand, so I looked up the passage to which I was referred. It contains what I am tempted to call, if I may do so without profanity, the ruling in Zelophehad's case.

Zelophehad's Case.—Zelophehad[1] was a man of the tribe of

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[1] Numbers xxvii. 1–11.

Mana seh, who died leaving no son but five daughters, and these daughters came to Moses, and claimed a share in their father's inheritance. Thereupon it was declared, on the highest authority, through Moses, that if a man died leaving daughters but no son, his inheritance should pass to his daughters. That declaration was modified by a subsequent provision,[1] that if a daughter married out of her tribe, she should forfeit her share. Let me remark, parenthetically, that this rule, and especially the exception about daughters marrying out of the tribe, represents a custom or customary law with which I was not unfamiliar.

Comparison with Mohammedan Law.—The Mohammedan law of inheritance divides the property of a deceased person among persons called "sharers" who include widows and daughters. There are a great many Mohammedans in the Punjab who are supposed to be bound by the law, the divine law, of the Koran, but the application of this law is much modified by local and tribal customs. They have a general feeling that the law of the Koran is very suitable to movable property, such as a flock of camels, but is inconvenient when applied to land. They sometimes cut down the widow's right to a share of the land to a right of maintenance, and nothing would induce them to allow a female sharer to carry by marriage any portion of the village or tribal land to a person who is a stranger to the village or tribe.

Position of Widow in Mosaic Law.—But to return to my visitors from Aden. What struck them as novel and monstrous was that the new law which had come upon them by surprise recognised a right in the inheritance on the part, not only of the children, but of the widow, for whom no provision was made by the Mosaic law. They asked that they might be allowed to return to their old law, and they referred me to a section of the Indian Succession Act (s. 332) which enables the Government of India by executive order to exempt from all or any of the provisions of the Act the members of any race, sect, or tribe in British India or any part of such race, sect, or tribe, to whom it may be considered impossible or inexpedient to apply such provisions.

Exemption of Jews from Succession Act.—The request struck me as being not unreasonable. But before disposing of it, I made two stipulations. The first was that whatever might be done for the Jews of Aden should not be construed as a precedent for exempting the Jews of British India proper, who had accepted the Act and did not complain of its operation. The second was that I should be supplied with an authoritative statement of the laws and customs observed by the Jews of Yemen; that is to say, of that part of Arabia in which Aden lies. Both these stipulations were complied with. I received from the leading Jews of British India proper an assurance that they would not ask for any exemption for themselves. And I was supplied with some interesting evidence as to the laws and customs of the Jews of Yemen, showing that for generations, in fact, during an indefinitely long period, they had never formed part of any civilised or settled State, and therefore had preserved their ancient laws and customs in an exceptionally uncontaminated form. The evidence satisfied me, and so, at my instance, the Government of India made an order exempting the Jews of Aden from the operation of the Indian Succession Act, and remitting them to the Mosaic code.

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[1] Numbers xxxvi.

Legal Antiquities in the Bible.—The lectures attracted the notice of a member of the Philadelphia Bar who had made a special study of early Jewish laws and customs, who is evidently conversant with Talmudic lore on the Mosaic code, and whose name suggests a family interest in that code. He sent me an interesting little volume to which I should like to draw the attention of readers of this journal.[1] For the author the Old Testament is a storehouse of legal antiquities, and the point of view from which he approaches his subject appears from a passage in his interesting "Introduction":

> The Bible is a collection of legends, chronicles, myths, historical narratives, laws, moral precepts, orations, rhapsodies and proverbs, written at different times during a period of probably over a thousand years. Much of this material existed as folklore and oral tradition long before it was written down; some of it probably first appeared in writing very nearly in the form in which it has been handed down to us. In these records many stages of civilisation have left memorials of their painful progress in religion, in morals, and in law. The striving of the human mind in its conquest of the physical world, the growth of the sense of right from its crude origin to its sublime perfection in the prophetic literature, the progress of society as revealed in the customs and

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[1] *Leading Cases in the Bible*, by David Werner Amram, M.A., LL.D., Member of the Philadelphia Bar. (Philadelphia, 1905.)

laws of many generations of nomads, farmers, citizens, ecclesiastics, and kings, the history of a remarkable people of Semitic origin, small in number, but of extraordinary ability to master its environment and survive under conditions which clearly pointed to annihilation—all this may be read in this remarkable collection of documents, the Bible.

It is from the legal point of view that Mr. Amram has tried to examine the biblical records, and with no other immediate purpose than to understand the nature of the legal institutions which are described in the Bible, and are illustrated by its cases, legends, and chronicles. These records he compares to the deposits left by the receding waters of time. The dates which they supply are not set forth separately and clearly, but, like the residuum on the seashore, scattered without order, partly buried in foreign matter, often entirely concealed from the eye of the superficial examiner, and exhumed only by the skill and patience of the delving student. Care must be taken to examine the records by the light of their own days, and to refrain from reading into them the ideas and thoughts of a later age. But the mere antiquity of the material in the records is no indication of its true chronological order. For instance, the Book of Judges contains records which in many instances are older by centuries than many of the events recorded in the earlier books. Much of the material in the Bible is legend and folklore, stories told by herdsmen of the desert and simple farmers of ancient Canaan.

"Leading Cases" in the Bible.—The eighteen "leading cases" which Mr. Amram has collected are described by him as merely raw material which may be of use to the student of the history of civilisation and the philosophy of law. He has arranged them in the order of their appearance in the Bible. He begins at the very beginning with the case of Adam and Eve, in which he discerns the patriarch exercising his power and authority, in conducting a judicial investigation. The strictly legal point of view from which he proceeds explains the freedom of his comments, which to some readers may be a little startling:

> The first question to be determined is, what crime was committed and what was the relative degree of guilt of the three offenders. Since the command not to eat of the tree had been given to Adam alone, he, strictly speaking, was the only law-breaker. The woman, although her talk with the serpent implies that she also was bound to obey this command, was, strictly speaking, merely an accessory before the fact The

serpent was only morally responsible and, as its only fault was inducing Eve to eat of the tree, it was legally guilty of no offence at all. If Eve had not induced Adam to do the same, no crime would have been committed; so that the serpent's action is seen to have been merely the remote cause of Adam's breach of the law.

How then is the severity of the sentence on the serpent to be explained? It is to be explained, according to Mr. Amram, by bearing in mind that "in this legend the serpent, condemned unheard, has the same status as the slave in the patriarchal household; it is not *sui juris*, and, therefore, has no right to be heard at all." The severity of its punishment is the result of the moral rather than the legal nature of the offence.

If we consider the status of the slave in the patriarchal household we can exactly understand how the indignation of the tribal chieftain might pour itself out first upon the helpless slave and so incline him to lessen the punishment of the more guilty member of his household.

Five of the other cases involve the legal status of women,

and in them may be traced the growth of the law on this subject from the exercise of *patria potestas* by Jephthah and Laban, through an intermediate stage illustrated in the case of Ruth, showing the right of women to transmit title to property, to the important case of Zelophehad's daughters, in which the legal status of women is vastly improved, they appear as plaintiffs in legal proceedings, and, through the procedure established, modify the law of intestate succession.

In the case of Jacob and Laban may be found some indication of a state of society, the matriarchate, in which power and property are transmitted through the females instead of the males.

Many of the cases illustrate the development of courts of law and their procedure.

The existence of a family court for the purpose of settling disputes between clansmen is hinted at in the case of Jacob and Laban. The Court of the Elders, the ancient Hebrew Curia, based originally on the consanguinity of its members, and later on their territorial jurisdiction, exercises jurisdiction in the case of the son of Shelomith, of Jeremiah, and of Boaz, and witnesses the conveyance of the case of Machpelah to Abraham.

One is tempted to multiply quotations, but it may suffice to say that the little book is one which Sir Henry Maine would have read with interest and appreciation.

GAMBLING DEBTS IN FOREIGN LAW.

[*Contributed by* W. J. BARNARD BYLES, ESQ.]

Gaming Securities Act, 1835.—The attempt to control the gambling and betting propensities of any country must often lead to strange results, and of this s. 2 of the Gaming Securities Act, 1835,[1] may be considered a somewhat striking instance. S. 1 of that Act was of course passed for the protection of the innocent holder for value of instruments arising out of gambling transactions, since under the earlier Acts of Charles II and Anne any one, however ignorant he were of its origin, who took such an instrument could not recover thereon, a manifest injustice which clearly called for a remedy! Though s. 1 permits the negotiation of these instruments as far as the rights of the innocent holder for value are concerned, yet s. 2 is obviously framed with the intention of deterring the original payee, that is the winner of the bet, from attempting so to deal with them, for in providing, as it in effect does, that if a loser gives a negotiable instrument void under the Acts against Gaming, and actually pays "any endorsee, holder, or assignee" of such instrument, he may recover back the money so paid from the person to whom he originally gave the instrument, the section in fact only permits the negotiation of such an instrument by the winner at the latter's own risk, since he may be called on to repay the amount to the person from whom he originally won the bet. As far as reported cases are concerned this section, however, appears for just about seventy-eight years from the passing of the Act to have been to all intents and purposes a dead letter, for it is doubtful whether between the years 1835 and 1912 there are more than two reported instances, one of which is the Irish case in 1876 of *Lynn* v. *Bell*,[2] of the aid of this section being invoked by the loser of a bet. But from November

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[1] 5 & 6 William IV. c. 41.

[2] 10 Irish R. Common Law, 487.

1912, when the case of *Collis* v. *Girling* (unreported except in the lay press) was decided in the City of London Court, there have been a series of cases, all with one exception decided in the county courts, dealing with the question. In practically every case the aid of the section has been invoked by a bookmaker against whom the Gaming Act has been pleaded as far as racing bets won by him of the defendent were concerned, as a means of recovering the amount of bets previously lost by him to the defendant and paid over to the latter by cheque. In the High Court case, that of *Nicholls* v. *Evans,*[1] the plaintiff was unsuccessful since all the defendant had done on receipt of the cheques was to pay them into his bank for collection, and the banker merely acted as the agent for collection. Had there, however, been evidence that the defendant's account was at the time overdrawn, then the Court inclined to the view that the banker would have collected in his own right, that is to say as "endorsee" within the meaning of s. 2, and the plaintiff would have been able to recover the amount. In the later case of *Gardner* v. *Lester*[2] the plaintiff did in fact succeed on this very ground, since there was proof that the defendant's account was at the time overdrawn when the cheques representing the amount of bets won by the defendant of the plaintiff were paid in. The net result of these decisions is indeed well-nigh to render nugatory the provisions of the Gaming Acts, which forbid the recovery of debts arising out of betting transactions by legal process, at least as far as bets on horse-racing are concerned, for such bets are clearly within the Act of 1835 and the earlier Acts. Persons addicted to transacting business with bookmakers are as likely as not to be in a more or less chronic state of indebtedness to their banker, if they possess an account, and if they possess no account, and have perforce to collect cheques received from the bookmakers through the medium of an obliging friend (in cases, of course, where the cheques are crossed, not "open" cheques), the latter would, if the cheques be payable to order, or he insist on endorsement, presumably be an "endorsee" within the meaning of s. 2. As pointed out by counsel in *Nicholls* v. *Evans*, it has been left to modern ingenuity to discover the practical use to which s. 2 may be put, though one which it is only reasonable to suppose can never have been contemplated by the legislators of 1835.

[1] [1914] 1 K.B. 118.

[2] [1914] 3 L.J. C.C.Rep. 51.

Doubtful Position of Third Parties in Foreign Law.—If foreign law does in fact protect the rights of the innocent holder—a point which may be regarded as a somewhat dubious one—it is not to the express provisions of any Code that he owes such protection. The terse provision contained in Art. 1965 of the French Civil Code whereby it is provided that no action lies in respect of a gaming debt or wager, is not qualified by any subsequent article protecting the rights of a holder in due course of a negotiable instrument given in respect of such gaming debt or wager. Provisions of a similarly unqualified character are to be found in practically all Civil Codes. In other words, the counterpart of s. 1 of the Act of 1835 is not to be met with in any of them. The French Courts do, however, appear to protect the rights of an innocent holder of a bill or note given in respect to a gambling debt, a course taken admittedly in the interests of commerce.[1] Thus the French Courts appear to have found it necessary to qualify the extremely inelastic provisions of the Civil Code, a course which, as likely as not, has also been found necessary in other countries. Art. 514 of the recent Swiss *Code des Obligations* of March 1911 does in fact acknowledge the right of a holder in good faith of *papiers valeurs* which have had their origin in a gambling transaction to recover thereon. The term would seem to cover the case of bills and notes, and, if this be correct, then this article may be regarded as affording a well-nigh unique example in a foreign Code of protection granted to the innocent holder. That the need of such protection has not made itself more manifestly felt is possibly owing to the very limited employment in many countries of bills, notes, and cheques, the latter especially, as compared with their employment in this country, with the result that the injustice of such a hard and fast rule as that contained in Art. 1965 of the French Code is the less likely to attract public attention, whereas in England it was the grave injustice inflicted in doubtless a very large number of cases that led directly to the passing of the Act of 1835.[2]

Money Paid Over Irrevocable apart from Fraud.—Though no action lies to recover a gaming debt, yet when once the amount of the bet has been paid over, it cannot in foreign law, apart from downright fraud, be recovered back. Since, as already mentioned, in the Civil Codes the rights of the *bonâ fide* holder seem to be totally ignored, it follows moreover as a necessary consequence that the equivalent of s. 2 of the Act of 1835 is not to be met with in any foreign Code. The negotiation of instruments which have their origin in a gambling transaction being in effect absolutely forbidden, there can be no third party able to enforce payment of the instrument by the original loser, and the circumstances contemplated by s. 2 can therefore never arise. It is true that Art. 1542 (2) of the Portuguese Civil Code provides that money lost at a game of *hazard* may be recovered back, but the sole object of this provision is manifestly the suppression of betting on games of this character, and it is in no sense analogous to s. 2. One Code, the Chilian Civil Code, undertakes to define what is meant by "fraud" in connection with betting transactions since it specifically refers (Art. 2261) to the case of a bet made on an event whose result is known by the winner to be inevitable, or is in fact known by him at the time he makes it. Other foreign laws have presumably considered it superfluous to provide definitely for such obvious cases of fraud as these, and, in respect to the second case covered by the Chilian law, a form of fraud peculiarly rampant in this country in connection with horse-racing bets, as the records of our criminal courts can testify.

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[1] Cf. Dalloz, *Nouveau Code Civil* [1905] ed. Griolet et Vergé, vol. iv. p. 808, par. 70 *et seq.*, and decision there cited, Cour d'Appel, Paris, July 27, 1896, reported Dalloz, *Jurisprudence Générale*, 1897, part ii. p. 122.

[2] Cf. per Fletcher Moulton L.J., *Meulis* v. *Owen* [1907] 1 K.B. at p. 762.

Cases of Married Women, Infants, etc.—The Chilian Code also contains another unusual provision in Art. 2262, which provides that in the case of persons not possessing the free disposal of their properties sums paid over for gambling debts may be recovered back by fathers of families, husbands, tutors, or curators. Thus a Chilian married woman afflicted with gambling propensities must be seriously hampered in indulging those propensities. With, however, the material exception of any reference to the case of a married woman the Italian Civil Code, which, as far as concerns the gambling question, is otherwise identical with the French, contains in Art. 1804 a similar provision to that in the Chilian Code. As regards the case of married women it may be doubted whether they possess such complete control over their separate estate in any foreign country as married women possess in this country under the Married Women's Property Acts, the nearest approach thereto probably being the case of a woman married under French law under the *régime* of *séparation de biens*, yet there is nothing in any of the Codes, with the single exception of the Chilian, to suggest that a husband as such has the right to demand back money spent by his wife in paying gambling debts. The case of a notorious spendthrift, whose estate is placed in the hands of a *conseil judiciaire* must, however, obviously stand on a different footing, and anybody attempting to carry on betting transactions with a person so circumstanced may well find himself in an awkward position, should he be paid his winnings, even though all the Codes, with the exception of the Italian and Chilian, ignore the question. The proviso found in all the Codes that money paid over for gambling debts is recoverable if there is any fraud in the transaction would doubtless be held to cover such a case, and equally the cases of money paid over for gambling debts by infants or by persons of weak intellect, so that it is in fact unnecessary, except possibly *ex majore cautelâ*, for the Codes generally to deal with these questions.

Certain Classes of Bets Excepted from General Law.—Though, generally speaking, no action lies to enforce a gambling debt, yet the French and other Civil Codes, including the Italian, Belgian, Spanish, Chilian, and Peruvian Codes, contain, from an English point of view, a strange exception in favour of certain bets. Art. 1966 of the French Code in effect provides that bets on all forms of sport which are calculated to promote military efficiency, and on games which are productive of bodily skill and exercise may be recovered by action provided that, in the opinion of the Court, the amount of the bet be not excessive. Certain forms of sport are specifically referred to in the article as covered by this provision, such as horse-races and tennis (*paume*), but it is obvious that there must be many cases of a dubious character, directly therefore provocative of litigation! The case of billiards, for instance, seems to have been the subject of considerable discussion, but, as may be imagined would be so, the preponderance of opinion is to the effect that bets on a billiard-match are not covered by Art. 1966.[1] It is certainly difficult to see how the mere act of tramping round a billiard-table can be regarded as in the nature of physical exercise, even though bodily skill is undoubtedly involved. Nevertheless, in Peru, it appears to be so regarded, but in that country the principle that gambling debts are not recoverable by action seems to have been reduced well-nigh to a dead letter, for it has been stated that in Peru bets on all games tending to *amusement*, provided they do not exceed a certain amount, are legally recoverable.[1] It is doubtful if any other country goes to such lengths as this. Art. 1966 of the French Code requires, it should be noted, that the game should not only be productive of bodily skill, but also be conducive to physical exercise, the two conditions not being in the alternative. Indeed the question of physical exercise is, if anything, the more important one, for practically all out-door pastimes have been held to come within the terms of the article, such as athletics generally, swimming, rowing, football, lawn-tennis, etc.,[2] and such forms of exercise as fencing and boxing, since there is nothing to confine the provision to games played in the open air. Shooting-matches, including of necessity that very doubtful form of sport, pigeon shooting, are also within the article; doubtless, since in these cases there is little question of physical exercise involved, it is a matter of competitions conducive to military efficiency. Whatever may be thought from the moral point of view of the policy of these provisions it is at least satisfactory to find that they apply only to bets of the actual participants in the games, and that the bets of mere onlookers are strictly ruled out. Thus that form of betting, rampant in this country,—coupon betting on professional football—would, if introduced into France, presumably benefit in no way by Art. 1966.

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[1] Dalloz, *Nouveau Code Civil*, vol. iv. p. 804, par. 40.

Horse-racing Bets.—The case of bets on horse-racing affords another example of the difficulty of logically enforcing these provisions. The only parties who could be considered to acquire bodily skill and obtain physical exercise from the practice of horse-racing would be, one would have thought, the actual jockeys themselves. Yet it seems to have been held by the French Courts that bets made by the jockeys on their own mounts do not fall within Art. 1966, but that bets made by the owners do.[3] This somewhat remarkable treatment of the provisions of Art. 1966 is said to be based on the interest taken by the State in horse-breeding questions (*l'élevage*). The article itself is absolutely silent on this particular point; possibly the matter may be considered as one affecting military efficiency, yet one may be inclined to suspect that the Courts were desirous of doing their best to enforce the Jockey Club rule, in force no doubt in France as in England, which forbids jockeys to bet on their own mounts. A definite solution of the matter has not, however, even yet, it appears, been reached,[1] and this fact tends of itself to show the illogical position arrived at if an attempt be made to exclude certain classes of bets from the general provision which makes gambling bets irrecoverable by action.

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[1] See *Code Civil Péruvien*, by R. de la Grasserie, Paris, 1896, p. 195.

[2] Cf. Dalloz, *supra*, p. 804.

[3] See Dalloz et Vergé, *Codes Annotés* [1895], vol. iii. p. 168, par. 846 *et seq*.

Amount Recoverable must be Reasonable.—As already mentioned, the amount of the bet must, in the opinion of the Court, be a reasonable one. It would seem that in France, at any rate, the Court cannot itself reduce the amount of the bet; if it in fact considers the amount excessive, then it must reject the whole claim.[2] But it is otherwise in Spain, for there the Court may reduce the amount to what it considers the proper amount for a good father of a family to venture.[3] This is certainly a very invidious provision, for not only does it apply, *prima facie* at least, the same test to all persons alike, whether married or single, but further it appears to presuppose in the actual members of the Court an intimate acquaintance with betting transactions, an acquaintance with which it is not usual, in this country at any rate, to credit the judicial body. Two Codes, the Mexican and the Peruvian, deal with the question in a more prosaic, if more practical way. Thus the Mexican provides that the bet must not exceed 100 *pesos* in amount, while the Peruvian Code provides that the amount must not exceed a fifth part of the monthly revenue of the loser, or a fifth part of his average monthly wages or earnings, otherwise the amount must not exceed 200 *pesos*.

Foreign and English Law compared.—One point well worthy of notice is that contained in Art. 1542 of the Portuguese Civil Code, which provides that gambling debts cannot be enforced by action even when disguised under the form of another contract, or of a novation, that is a new contract superimposed upon the old. Thus this provision would appear to make short work of the contention so frequently raised of late, and with success, in the English

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[1] Dalloz, *Code Civil*, vol. iv. p. 805, pars. 65–8.

[2] *Ibid.* par. 61.

[3] Civil Code, Art. 1801.

Courts to the effect that the agreed forbearance of a holder of a cheque given in relation to betting transactions to have the party liable posted as a defaulter for non-payment, or to take other steps tending to involve the latter's social ostracism, constitutes a sufficient consideration for a new contract which may sustain an action. In other words, an easy way is now open to the bookmaker to obtain payment of sums due to him. The betting fraternity as such may regard with some misgiving the construction now put upon s. 2 of the Act of 1835; it partakes too much of the character of a two-edged sword, and its extensive application may lead to strange results. This question of forbearance, on the other hand, is far simpler in its application, invoked moreover as the principle almost invariably is by the bookmaker against his client, and not *vice versâ*, it may be regarded as an effectual means of protection to a bookmaker's business, though whether such a business, however honestly conducted, should be so protected is of course another matter. The net result of recent decisions, however, is that in this country, in reference especially to horse-racing debts, we have in fact adopted, in spirit at any rate, the principle, as it may be termed, of the privileged bet as enforced by the French, and the other laws above referred to, but we have not at the same time adopted—it was of course obviously impossible to do so apart from legislative interference—any of the safeguards enforced by those laws, and in particular the requirement that the amount recoverable must be a reasonable one. However illogical the working of the principle of the privileged bet may, as already suggested, tend to become, it may yet be questioned whether the recognition of the right to recover by action, within strict safeguards, on certain classes of bets is not in fact preferable to the present state of things in this country. Until the Legislature intervenes and agrees to an amendment of the law somewhat on the lines of that contained in Art. 1542 of the Portuguese Civil Code, and possibly also to a repeal of s. 2 of the Act of 1835, it is open to the foreign critic of our institutions to maintain that we have been careful so to frame our statutes relating to gambling that they may interfere as little as possible with the sporting proclivities of the day, and that these statutes belong essentially to the class through which the proverbial coach and four may be driven.

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS IN THE UNITED STATES.

[*Contributed by* WALTER GEORGE SMITH, *a former President.*]

THE American Bar Association, composed of lawyers and judges from all of the States and jurisdictions of the United States with a membership in excess of 10,000, sprang from a meeting of a small group of lawyers in the month of August 1878. They made up in eminence in their profession and broad public spirit for their paucity in number. The declared purposes of the Association are to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout the Union, uphold the honour of the profession of law, and encourage cordial intercourse among the members of the American Bar. How well the purposes have been carried out may be found in the thirty-seven volumes of its annual reports with their record of careful study of all branches of jurisprudence, as shown in the reports of the committees and the learned addresses and papers that have been read before the Association, including among other illustrious names those of a Lord Chief Justice and a Lord High Chancellor of England. There has been no failure of effort to attain any one of the purposes of the Association, and it may be reasonably stated that in the matter of the attainment of uniformity of legislation it has achieved notable success.

New York Commission for Promotion of Uniformity.—In 1889 a plan was proposed whereby a committee should be appointed, consisting of one member of the Association from each State, to meet in convention to consider the best way of attaining uniformity upon certain subjects which seemed most desirable. Before this committee had accomplished anything, however, an Act was passed by the Legislature of New York, in the year 1890, authorising the

Governor to appoint three commissioners by the name and style of Commissioners for the Promotion of Uniformity of Legislation in the United States, it being their duty to examine the subjects of marriage and divorce, insolvency, the form of notarial certificates and other subjects, to ascertain the best means to effect an assimilation and uniformity in the laws of the States, and especially to consider whether it would be wise and practicable for the State of New York to invite the other States of the Union to send representatives to a convention to draft uniform laws to be submitted for the approval and adoption of the several States. From this time, all the efforts for uniformity came under one direction. The invitation of the State of New York was so far accepted that in a few years a large proportion of the States were represented in the Conference, sometimes by virtue of legislative enactment, and often by the appointment of the Governor without such authority. At present, the roll of membership shows that all of the States, Territories, and possessions of the United States are represented, usually by three commissioners, and at the last, the twenty-fifth annual meeting held at Salt Lake City in August 1915, thirty-three jurisdictions were represented by commissioners actually in attendance.

Extent of Divergency of Laws.—To appreciate the importance and real necessity for the work in which these commissioners are engaged, it needs but to consider the fact that all of the forty-eight States of the Union are independent of each other, excepting so far as they have delegated certain rights of sovereignty to the Federal Government. As the thirteen original colonies were independent of each other, and the Federal Government which came into being in 1789 was one of delegated powers limited by a written Constitution, a system of jurisprudence in many respects differing from those of its neighbours arose in each one of the newly formed States. Although each of them was based upon the principles of the common law, it was not long before divergency of judicial decisions, as well as divergent statutes, began to attract the attention of students of our system of political government and of the business community. As the density of population increased, and railroads and steamboats extended the area of business activities, a real evil showed itself in the divergency of the laws of the different jurisdictions, especially on commercial subjects.

In more recent times, the scandalous confusion and hardships arising from the differing divorce laws in their jurisdictional and procedural features have attracted great attention and emphasised the necessity for uniformity of laws; but long before the decadence of morals, exhibited by the unprecedented growth of divorce in the United States, had developed, interstate commercial business was seriously impeded by the lack of uniformity of law.

Conflict between Federal and State Rights.—The student of American political history will note that there has been from the beginning a distinct tendency towards a liberal construction of the Constitution of the United States and an enhancement of the powers of the National Government on the one hand, and a jealous provincial effort on the other, to retain all of the sovereignty that each State reserved to itself when ratifying the National Constitution. The result of the disastrous effort to prove the Constitution to be but a rope of sand with the right of secession of each State, which failed after four years of civil war, has been to magnify the powers of the National Government. The Constitution as now amended and as interpreted by the Supreme Court of the United States exhibits a Federal government, national in all of its attributes, with powers actually exercised through the interstate commerce clause of the Constitution that reach to the very roots of business and social life in all of the States of the Union. With the exception, however, of a few ardent advocates, the great bulk of political thinkers would retain in the States their exclusive jurisdiction over matters relating to internal commerce, police, and domestic regulations.

Notwithstanding the destruction of the old doctrine of State rights, it is recognised that the principle of home rule must be preserved for the continued success of democratic government on so large a scale, and the Union must continue as "an indestructible union of indestructible States."[1] None the less, special evils arising from the two co-existing sovereignties afford constant opportunity for enlargement of Federal jurisdiction. The latest and most open manifestation of this will be found in the failure of the effort to secure agreement among the States upon a uniform law governing the subject of jurisdiction in divorce and defining the effect of a decree in all of the States of the Union.

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[1] *Texas* v. *White*, 7 Wallace 700.

Uniform Divorce Law.—Impressed by the alarming extent to which the divorce statutes, which exist in all of the States excepting South Carolina, were being appealed to, and the fraud and collusion which seem to be the necessary consequence of divorce laws everywhere, the Legislature of Pennsylvania caused the Governor of that State to invite delegates from all of the other States to meet in congress to consider what could be done to abate the evils of the existing Constitution. This congress met in 1906 and formulated a reasonable and moderate divorce bill, embodying the principles approved by the American Bar Association and made up of the best features of existing statutes in the different States; but in the ten years that have elapsed since the adjournment of the congress, only three of the States have accepted the proposed law, not including Pennsylvania. It was not remarkable, therefore, that those who do not sympathise with the modern tendency towards lack of reverence for the sacredness and permanency of the marriage tie have turned with a sort of despair towards the proposal to amend the Constitution so as to give the Federal Government jurisdiction of marriage and divorce.

Need for Uniformity in Legislation.—There are few large business houses or manufacturers whose business does not extend beyond State lines. From this element has come the substantial support for the efforts of the Conference to bring about uniformity on commercial subjects. Of great importance too are the efforts now pending to establish uniformity in the matter of testamentary law, the capacity for making a will, and the requirements of execution and probate. The variety and importance of the subjects on which uniform legislation is desirable in such a federation as the United States, appear upon a slight examination. The difficulty of attaining uniformity on any one subject is very great, yet, with patience and courage, on the completion of its twenty-fifth year the Conference could show substantial success. The five Acts which have become known as the American Uniform Commercial Acts put into the form of statutes the law on the subject of negotiable instruments, warehouse receipts, transfer of stocks, bills of lading and sales. Within the past two years another, the Partnership Act, has been added and has been adopted in Pennsylvania and Wisconsin, and will no doubt meet with approval in other States during the current year when so many Legislatures are in session.

The Conference has now under consideration a Uniform Act relating to partnerships with contributing members and has directed the drafting of Acts governing conditional sales and fraudulent conveyances. On other than commercial subjects, Acts have been approved relating to desertion and non-support of wife and children; to wills executed without the State; to marriage licences; a Uniform Child Labour Act; an Act on the subject of marriage in another State in evasion of the laws of the State of domicile; an Act to make uniform the law of acknowledgments to deeds or other instruments taken outside of the United States; a Uniform Cold Storage Act; a Land Registration Act; a Uniform Workmen's Compensation Act, and an Act regulating weights and measures, and has adopted the Uniform Divorce Law recommended by the Divorce Congress. These subjects have been dealt with under pressure of obvious necessity but with great deliberation.

Procedure of Conference on Uniform Laws. — The method adopted by the Conference is to employ as the draftsman of an Act one who is an expert upon the subject. After this draft has been prepared, it is examined wth great care by an appropriate committee and then by the Conference in committee of the whole. It is then submitted for criticism to the profession at large and especially to law teachers, and sometimes public meetings are held by the committee where any one interested in the subject is welcome to present his views. Another tentative draft is then presented to the Conference, and the Act may then be approved and recommended to the various States for adoption. In some instances, however, as many as four tentative drafts of an Act have been prepared before this final stage has been reached.

It took a number of years for the Conference to secure its proper orientation. There are those who think it has not yet done so. At the session of 1915 a new constitution and by-laws were adopted, providing for a closer co-ordination in the work; and, to avoid as far as possible mistake in the choice of subjects, a standing committee on scope and programme was provided for, so that for the future the work might be directed towards the completion of a programme which would not include any subject upon which uniformity was not essential, but would include every subject on which it was proper for the Conference to concentrate its efforts.

When it is considered that the Uniform Acts which have emanated from the Conference carry no sanction beyond their own intrinsic excellence, it is remarkable that their acceptance has been so general. Handicapped by lack of money, the work of the Conference has been really a labour of love and public spirit on the part of the commissioners. Only a partial number of the States appropriate towards the expenses of their commissioners and of the Conference itself. Had it not been for the appropriations of these States and of the American Bar Association, the necessary expenditure for fees of experts and printing could not have been met and the whole plan of the Conference would have failed.

By slow degrees it has now become known as a body whose labours are marked by exceeding care and proper conservatism. It has striven to avoid the danger of becoming a reforming organisation. The instructions given to its experts and followed by them with scarcely an exception have been to keep in mind the plan adopted by the English draftsman, Sir M. D. Chalmers, in the preparation of the English Bills of Exchange Act and the Sale of Goods Act, who, in drafting these Acts, was careful to observe the rules settled by the long succession of judicial decisions, and where authorities differed, to follow the weight of authority. In so doing the Conference acted upon the principle adopted by the American Bar Association at its meeting in 1886, that the law itself should be reduced, so far as its substantive principles are settled, to the form of a statute.[1]

Negotiable Instruments.—The work of the experts has been greatly facilitated by having the English statutes as a basis for their own. Thus, the Negotiable Instruments Act was based largely on the English Bills of Exchange Act of 1882. It was drawn by John J. Crawford, Esq., of New York, and has stood the test of practical application for a longer time and in more of the States than any of the Uniform Acts, as it was adopted as early as 1897 in Colorado and Connecticut.

Warehouse Receipts, Stock Transfer, and Bills of Lading.—The Warehouse Receipts, Stock Transfer, and Bills of Lading Acts have dealt with documents of title on the mercantile theory of " the complete assignability of the document, if it runs to order, and the complete identification of the document with the goods which it represents." Obviously, these doctrines are contrary to the common law, since choses in action are not assignable and constructive delivery had never been so far recognised as to ensure the goods from being dealt with in the hands of the actual possessor after constructive delivery had been made by means of the document. The consequence is that, except in the case of warehouse receipts which have not full negotiability in the hands of a thief or finder, documents of title have become fully negotiable under these statutes.

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[1] *Report American Bar Association*, 1886, p. 74.

Negotiable Instruments.—The Negotiable Instruments Act is the law in forty-seven of the jurisdictions, there being only six that have not yet adopted it. Many of the sections of the Act have been the subject of judicial interpretation, and there has been some contrariety among them; but, speaking generally, the Act has been found practically without flaw except in very few instances and has received the encomium of those best qualified to judge as a remarkable piece of codification. In some particulars the text of the Act, as adopted, differs in a few of the States, but for the most part it has been taken as it came from the hands of the Conference *verbatim et literatim*. Referring to this Act, it has been said:

> The design (of the Negotiable Instruments Act) was to obliterate State lines as to the governing instrumentalities so vital to the conduct of interstate commerce as promissory notes and bills of exchange, to remove the confusion or uncertainty which might arise from conflict of statutes or judicial decisions among the several States, and to make plain, certain and general, the controlling rules of law. Diversity was to be moulded into uniformity. . . . Simplicity and clearness are ends especially to be sought. The language of the Act is to be construed with reference to the object to be attained. Its words are to be given their natural and common meaning, and the prevailing principles of statutory construction are to be employed. Care should be taken to adhere as closely as possible to the obvious meaning of the Act, without resort to that which has theretofore been the law of this commonwealth, unless necessary to dissolve obscurity or doubt, especially in instances where there was a difference in the law in the different States.[1]

It may be confidently asserted that, notwithstanding some diversity of interpretation, the passage of this Act has brought about substantial uniformity of law in the United States on the subject of negotiable instruments.

Warehouse Receipts.—The Uniform Warehouse Receipts Act has been adopted in thirty jurisdictions. This Act had for its draftsmen Messrs. Samuel Williston, Professor of Law in the Harvard Law School, and Barry Mohun, of the Bar of the District of Columbia. In referring to this Act, Mr. Williston says:

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[1] *Union Trust Co.* v. *McGinty*, 212 Mass. 205, 206. See also *American Bar Association Journal*, vol. ii. p. 72.

> Warehouse receipts and bills of lading have become very important commercial documents and merchants have developed a systematic theory in regard to them. This theory is based on the analogy of bills of exchange and promissory notes, the law of which also had its origin in the custom of merchants. . . . The extent to which Courts have adopted the mercantile theory varies. Probably no Courts have gone so far as the suggested legislation in regard to warehouse receipts, unless a statute has been passed. . . . These statutes have, to some extent, failed in their purpose, because they have failed to define what they mean by negotiability. In the nature of the case there are some differences between a bill of exchange and a warehouse receipt.

In the United States enormous values are held in warehouses—cotton in the South, grain in the West—and in the cold storage warehouses of the East; and by the enactment of the Uniform Warehouse Receipts Act it is sought to make the law governing such documents of title the same everywhere, and especially that the use of a warehouse receipt as bankable paper will be encouraged, thus unlocking values. The object of the draftsmen has been to make the warehouse receipt as far as possible the representative of the goods for which it has been issued. S. 40 of this Act provides:

> A negotiable receipt may be negotiated (*a*) by the owner thereof; or (*b*) by any person to whom the possession or custody of the receipt has been entrusted by the owner, if, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of the person to whom the possession or custody of the receipt has been entrusted, or if at the time of such entrusting the receipt is in such form that it may be negotiated by delivery.

Thus it follows that warehouse receipts under this Act become fully negotiable, excepting by one who takes by trespass or a finder. It will be noted that this differs from the rule in relation to bills of lading, to which under the Uniform Act full negotiability has been given; and a similar rule applies to certificates of stock.

Stock Transfer.—The Uniform Stock Transfer Act has been accepted by nine States. This Act also was drafted by Professor Samuel Williston.

Francis B. James, Esq., who was Chairman of the Committee on Commercial Law of the National Conference when this Act was under consideration, said:

> In formulating this Act, the Committee on Commercial Law has treated certificates of stock as documents of title and as commercial paper. . . . The Act . . . deals primarily with a certificate of stock as a piece of commercial paper and, secondarily, its relation to the corporation issuing it. The fundamental principle of the Act is that a certificate of stock becomes the sole and exclusive representative of shares of stock in a corporation, and that such certificate shall pass freely from hand to hand, and that a *bona fide* purchaser for value of a duly endorsed certificate shall become the owner of the certificate and the shares represented thereby against all the world. The essence of the Act may be said to centre about s. 8, which provides:
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> "Although the transfer of a certificate or of shares represented thereby has been rescinded or set aside, nevertheless, if the transferee has possession of the certificate or of a new certificate representing part or the whole of the same shares of stock, a subsequent transfer of such certificates by the transferee, mediately or immediately, to a purchaser for value in good faith, without notice of any facts making the transfer wrongful, shall give such purchaster an indefeasible right to the certificate and the shares represented thereby."

Sale of Goods.—The Uniform Sales Act has been passed in fourteen States. It also comes from the pen of Mr. Williston, who had as the basis of his work the English Sale of Goods Act of 1893. In the first edition of his work on the Sale of Goods Act, Sir M. D. Chalmers gives its history showing that five years elapsed between the original draft of the Act by him and its final adoption. The American Uniform Act was first printed in 1903 and submitted for criticism and redrafting from time to time until 1906, when it was finally adopted. The adoption of this Act will make no radical change in the law of any State, but will make minor changes in the law of all of the States.

Bills of Lading.—The Bills of Lading Act has been passed in thirteen States. This Act was first drafted by Professor Williston in 1906. Thereafter five separate drafts were prepared and considered at meetings of the Committee held in various parts of the country, and with the assistance of criticisms of representatives of bankers, manufacturers, warehousemen, credit men, counsel for leading railroads, as well as professors of law schools. Finally, in 1909 the draft was perfected. In this Act, the bill of lading is dealt with primarily as a document of title and, secondarily, as defining the relations of shipper and carrier. In so far as it relates to such documents, the bill of lading may be of two kinds under this Act, a straight bill of lading and the order bill of lading. The order bill of lading is based upon the precise basis of negotiability of a promissory note, cheque, draft, or bill of exchange.

All of the Uniform Commercial Acts contain this section :

> In any case not provided for in this Act, the rules of law and equity including the law merchant shall govern,

and all, excepting the Negotiable Instruments Act, contain this section :

> This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it.[1]

In a recent decision by the Supreme Court of the United States,[2] *Commercial National Bank of New Orleans* v. *Canal-Louisiana Bank & Trust Co.*, Justice Hughes says :

> This rule of construction requires that in order to accomplish the beneficent object of unifying, so far as this is possible under our dual sytem, the commercial law of the country, there should be taken into consideration the fundamental purpose of the Uniform Act, and that it should not be regarded merely as an offshoot of local law. . . . We think that the principle of the Uniform Act should have recognition to the exclusion of any inconsistent doctrine which may have previously obtained in any of the States enacting it.

Partnership.—The Uniform Partnership Act was perfected in 1914 and has been passed in but two of the States, though during the current year other States may be added to the list. This Act was drafted by Dr. William Draper Lewis, of the University of

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[1] See *American Bar Association Journal*, vol. ii. p. 60, article by Jacob Sicherman.

[2] Oct. T. 1915, No. 117.

Pennsylvania. The preface to the annotated copy of the Act points out that:

> Uniformity of the law of partnerships is constantly becoming more important, as the number of firms increases which not only carry on business in more than one State, but have among the members residents of different States.
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> It is, however, proper here to emphasise the fact that there are other reasons, in addition to the advantages which will result from uniformity, for the adoption of the Act now issued by the commissioners. There is probably no other subject connected with our business law in which a greater number of instances can be found where, in matters of almost daily occurrence, the law is uncertain. This uncertainty is due, not only to conflict between the decisions of different States, but more to the general lack of consistency in legal theory. In several of the sections, but especially in those which relate to the rights of the partner and his separate creditors in partnership property, and to the rights of firm creditors where the personnel of the partnership has heen changed without liquidation of partnership affairs, there exists an almost hopeless confusion of theory and practice, making the actual administration of the law difficult and often inequitable.
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> Another difficulty of the present partnership law is the scarcity of authority on matters of considerable importance in the daily conduct and in the winding up of partnership affairs. . . . The existence of a statute stating in detail the rights of the partners' interest during the carrying on of the partnership business, and on the winding up of partnership affairs, will be a real practical advantage of moment to the business world.

There are two theories under which Partnership Acts could be drawn. One deals with the partnership as an entity, and this is considered the mercantile view of partnership. The first impression of the Conference was that the Act should be drafted upon that theory, and an effort in that direction was made by the late James Barr Ames, of Harvard University, but objection developed, and after his death, when Dr. Lewis was invited to take up the work, this theory was discarded, and the common law theory was the basis of Dr. Lewis's work. By this Act a partnership is defined to be "an association of two or more persons to carry on as co-owners a business for profit." The Conference has been criticised for adopting the aggregate or common law theory of a partnership, but unless it had decided to adopt another plan from that which has governed it in all of its commercial work, namely, to take the law as it had been settled and reduce it to the form of a statute, no other conclusion could have been reached. An interesting series of articles have appeared in the *Harvard Law Review*[1] attacking and defending the work of the Commission upon this subject.

Work accomplished by Commission.—It would be beyond the reasonable limits of this article to dwell upon the commercial Acts in any detail, and those who are interested will find in the reports of the American Bar Association and the proceedings of the National Conference of Commissioners all requisite information with regard to the various Acts. A glance at the list of those that have been passed, in addition to the commercial Acts, will give some idea of the industry of the Commission and the extent to which their work has been accepted. It must be borne in mind, however, that some of the Acts have been passed but recently, and others are intended merely to be model Acts to which literal uniformity is not necessary.

The Family Desertion Act has been passed in nine States; the Uniform Probate of Foreign Wills Act in eleven States; the Uniform Marriage Evasion Act in four States; and the Uniform Workmen's Compensation Act in one State. The Uniform Marriage Licence Act, Child Labour Law, Acknowledgments Act, and Cold Storage Act have not yet been passed in any of the States.

Difficulties in securing Uniformity.—The Hon. Lyman D. Brewster, of Connecticut, for many years the President of the Conference, points out some of the difficulties that confront the individual members of the Conference, when with its perfected work they approach their Legislatures and seek to have it put upon the statute book. He says:

> The difficulty of inducing legislation is only too manifest. Legislators, as a body, do not hold sessions for the general improvement of interstate jurisprudence, or to improve the science of law as such. They hardly consider themselves elected for that purpose. They represent distinct parties and material interests, with definite local aims, and while on the judiciary committees are to be found able lawyers and skilful draftsmen, and men who are actuated by the highest motives to accomplish good work for their profession and the people, the time of such men is apt to be exhaustively occupied with the local and routine work of the session.
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> Then again, the proposals for uniformity, by new statutes, are met with the natural argument that there is already too much legislation,

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[1] Vol. xxviii.

and with the mistaken assumption that the measures proposed for uniformity will but increase the growing mass. To remove these ostensible objections, and demonstrate the utility of uniformity, the Conference of Commissioners needs the aid of every business association and every bar association in the Union.

It is but just to add that this assistance has been given in full measure. Without it, the work of the Conference would have been far less successful.

THE COMMISSIONERS' TWENTY-FIFTH REPORT.

[*Contributed by* SIR M. D. CHALMERS, K.C.B., C.S.I.]

The twenty-fifth report of the National Conference of Commissioners on Uniform State Laws is full of interest. The subjects which principally engaged the Conference were the final revision of model laws concerning land registration, foreign probate, and state flag laws. But the opportunity was taken to review the work of the Commission during a quarter of a century of laborious and unselfish work. The object of the National Commission is to bring something like order into the legal chaos which results from the activities of fifty-three States and Territories, with independent legislatures and independent hierarchies of courts. Under the supervision of the Commission a model law is drafted, and then the draft law is laid before the legislatures of the various States which may consider it favourably, and efforts are made to pass it with as little modification as possible.

Value of Work to Business Men.—In 1902 I was invited to attend the annual meeting of the American Bar Association which met that year at Saratoga. The Commission on Uniform State Laws held their annual conference at the same time, and most kindly invited me to attend their meetings and take part in their discussions. The late Judge Brewster of Connecticut was in the chair, and it would be difficult to find a more learned, courteous, and considerate chairman to preside over any legal body. The discussions were always brief, practical, and friendly. At that time attention was turned chiefly to mercantile law, where obviously uniformity and certainty are of great importance to business transactions. The first model law, namely, the Negotiable Instruments Law, had been adopted by the State of New York and a few other States. It was decided to proceed with the law of sale of personal property, and Professor Williston of Harvard was entrusted with the preparation of the first draft. It appears from this year's report that the Sales Law was approved by the Commission in 1906, and that it has now been adopted by fourteen States. Excluding the three model laws approved in 1915, the Commission has drafted fifteen laws and recommended them for adoption to the various States. The following table and extract from the report show the practical results to date:

Acts.	Jurisdictions where adopted.	Jurisdictions where not adopted.
Uniform Negotiable Instruments Act .	47	6
Uniform Sales Act	14	39
Uniform Warehouse Receipts Act .	30	23
Uniform Divorce Act . . .	3	50
Uniform Bills of Lading Act . .	13	40
Uniform Stock Transfer Act . .	9	44
Uniform Family Desertion Act . .	9	44
Uniform Probate of Foreign Wills Act .	11	42
Uniform Marriage Licence Act . .	0	53
Uniform Child Labour Law . .	0	53
Uniform Marriage Evasion Act . .	4	49
Uniform Acknowledgments Act . .	0	53
Uniform Partnership Act . . .	3	50
Uniform Cold Storage Act . . .	0	53
Uniform Workmen's Compensation Act	1	52

An examination of this table shows that no Act approved by this Conference and recommended by it for adoption has been adopted by all the jurisdictions of the United States; that some of the Acts which were approved some years ago have been adopted in none of the States; that there are sufficient Acts approved and jurisdictions which have not adopted them to afford a broad field for the work of this Conference; that no State has adopted every Act approved by the Conference, so that the commissioners from every State may have something to work on at home.

A successful campaign for the adoption by all jurisdictions of the Acts already approved would do more to promote uniformity than the continued approval by this Conference of Acts, even on important subjects, with no following campaign to secure their enactment into law in the different jurisdictions (p. 141).

Distinction Between Social and Commercial Legislation.—A reference to the table cited above shows what might be expected, namely, that mercantile legislation has been much more readily adopted than social legislation. Business men see the advantage of a uniform law for commercial purposes. Commerce knows nothing of State boundaries. If a man sends a bale of goods from some town in Pennsylvania to New York he does not see why the despatch of the goods should be regulated by a law which he knows, while the receipt of the goods should be regulated by another law which he does not know. What mercantile men require is a clear rule to provide for cases when the parties have either formed no intention or have failed to express it. Where the rule of law is certain the parties know when to stipulate and what to stipulate for. Social legislation stands on a different footing. Freedom of contract is out of place. The law must be oligatory. A marriage licence law with power to contract out of it would be nugatory. In the abstract a marriage, or divorce, or child labour law may seem unimpeachable to a body of impartial jurists, but it affects the whole body of citizens, gentle or simple, ignorant or instructed, and there will always be a powerful and interested opposition to urge its rejection.

Negotiable Instruments Act.—The most successful of the laws prepared by the Commission is the Negotiable Instruments Act. It has now been adopted by forty-seven out of the fifty-three States and Territories. The only jurisdictions which have not adopted it appear to be California, Georgia, Maine, Mississippi, Porto Rico, and Texas. The Act was drafted by the Commission in 1896, and adopted by the State of New York in 1897. Its gradual adoption by forty-six other States and Territories is good evidence of its utility.

Similar International Action.—The example of the Commission on Uniform State Laws has been followed by a more ambitious experiment. The Dutch Government summoned an International Conference to frame a uniform law for bills, notes, and cheques. Delegates from thirty-six countries attended the conferences, which were held at the Hague in 1910 and 1912.[1] A uniform model law was drawn up, and thirty-three countries signed the convention undertaking that each country should enact the law, with or without certain agreed modifications, for its own territory. Unfortunately

[1] For an account of this Convention see Journal, vol. xiii. pp. 570–3.

most of the great commercial nations which signed the convention are now at war, and have more pressing matters to attend to than the law relating to bills and notes. England and the United States were unable to sign the convention ; Mr. Charles Conant, the United States delegate, in his first report to his own Government, explains the attitude of the two countries:

> The reasons (he says) why Great Britain and the United States were unable to concur without reservations in the protocol of the [1910] conference will be discussed at length further on in this report. It is sufficient to say at this point that they did not arise from lack of sympathy with the objects of the conference, but from certain fundamental differences between Anglo-Saxon and Continental law, and from the fact that comparative uniformity of law has been brought about during the past thirty years in Great Britain and her dependencies, and in various States of the American Union, by long and arduous efforts, which would be largely nullified, with the result of renewed confusion, if it were attempted to substitute a complete new code for the laws which have thus been secured.

This statement, which was approved by the United States Government, is incidentally a tribute to the good work done by the Commissioners on Uniform State Laws.

LEGAL PROCEDURE IN CANADA.

[*Contributed by* G. S. HOLMESTED, ESQ., K.C.]

IN the year 1873 the great reform of legal procedure in England inaugurated by the English Judicature Act came into force, but it was not till eight years afterwards that a similar step was taken in Canada.

In the Province of Quebec a Civil Code is in force, and the procedure of its Courts is based on a French model, and in that Province no attempt has been made to adopt the principles of the English Judicature Act, possibly because the need of doing so has not been felt.

But in the rest of the Provinces of Canada, from the Atlantic to the Pacific, the various systems of procedure in force in the Superior Courts are all based more or less intimately on the English Judicature Act and Rules.

Procedure in Ontario.—The Province of Ontario was the pioneer in adopting the English system, and in 1881 the first Judicature Act and accompanying rules adapting the English system to the needs of that Province were passed, and it may be therefore interesting to trace how that system has been gradually developed in the Province of Ontario.

But, in the first place, we should glance at the condition of legal procedure in that Province, which the Judicature Act (1881) was designed to supplant. In Ontario, as in England, common law and equity were administered by separate and distinct Courts. We had the Court of Queen's Bench and Common Pleas to administer law and the Court of Chancery to administer equity, but there was no Court having any matrimonial jurisdiction except the power to grant alimony, which was assigned by statute to the Court of Chancery. The jurisdiction of these courts was defined by statute, and, on the whole, was similar to that of the English Courts of the same names including a provincial jurisdiction in admiralty. These were courts of first instance, and the procedure in these courts of law was based on the English practice at law, and the practice in the Court of Chancery was based on the English practice in equity as it existed prior to the Judicature Act. Besides these three courts of first instance there was a fourth court called the Court of Appeal, whose jurisdiction was chiefly confined to the hearing of appeals from the courts of first instance.

Ontario Judicature Act.—By the Ontario Judicature Act of 1881, one court styled "the Supreme Court of Judicature for Ontario" was created consisting of two Divisions, viz. "the High Court of Justice" and "the Court of Appeal." Under this Act the former courts of first instance were practically continued, but as Divisions of the High Court. Actions were commenced in any of these Divisions at the election of the suitor, and the proceedings were carried on in the particular Division in which the action was commenced. Divisional Courts for each Division sat for the hearing of motions, such as were formerly heard by the Common Law Courts *in banc*. And although the three Divisions were collectively and nominally one Court, viz. the High Court of Justice, yet practically they pursued a sort of independent existence as separate courts, but with this distinction, that each Division exercised the full jurisdiction of the High Court of Justice as a court both of law and equity. The Court of Appeal also continued to exist as a separate and distinct tribunal, and while the various Divisions of the High Court exercised jurisdiction in the name of "the High Court of Justice, Queen's Bench Division" or as the case might be, the Court of Appeal exercised its jurisdiction in the name of "the Court of Appeal." "The Supreme Court of Judicature for Ontario" was under this system nothing but a name, and no jurisdiction whatever was exercised in its name. The principal changes effected by the Act of 1881 may be briefly summed up as follows: (1) It gave all superior courts of first instance co-ordinate jurisdiction at law and in equity. (2) It assimilated the practice in all of the Divisions of the High Court, and from that time there ceased to be a separate common law and equity practice.

These were important changes, but could only be regarded as tentative steps towards the desired end.

The procedure provided was in the main similar to that prescribed by the English Act, and on the whole worked fairly well, although the attempt of common law lawyers to deal with equity cases may not have been always very satisfactory; but the result has been to create a body of lawyers more or less versed in the principles both of law and equity, instead of a class of men exclusively devoted to common law or equity respectively as had been the case under the prior system.

Revision of 1888.—In 1883 the Judicature Rules in England were revised, and consequent upon that revision a further step was, five years later, taken in Ontario, where a revision and consolidation of the Act and the rules of practice was also made. Under the Ontario Act and rules of 1881, certain rules of the former courts of law and equity, so far as applicable, were continued in force, but the specific rules which were thus continued were not defined. In the revision of 1888 all the rules intended to be operative were revised and consolidated, and all those of the former courts were repealed. The effect of this revision was to codify the practice and to remove the uncertainty as to which of the rules of the former courts remained in force. The changes effected by the English Rules of 1883 were to a large extent adopted. But in the main the original system of the constitution of the Court, and the practical continuation of the former courts of law and equity as separate courts under the name of Divisions of the High Court was continued until 1895, when a further change was made in the statute, and the Divisions of the High Court, though continued in name, ceased to exist as separate courts, and actions were no longer brought in the separate Divisions, but simply in the High Court of Justice.

This led the way to a further consolidation of the Acts and Rules in 1896, whereby the superior courts were practically reduced from four to two courts, viz. the High Court of Justice and the Court of Appeal. The practice as established in 1896 continued in force, subject to certain modifications from time to time made, until 1913.

Prior to this year there had been an agitation raised against the numer of appeals permissible under the Act and Rules of 1896, which enabled appeals to be carried from a judge sitting in court (*a*) to a Divisional Court of the High Court, (*b*) and thence to the Court of Appeal, (*c*) and thence to the Supreme Court of Canada.

Revision of 1913.—It was thought that this constituted a blot on the system, and it was therefore determined to abolish the Divisional Courts of the High Court altogether, and to permit but one appeal in the Provincial Court, viz. from the judges of first instance to the Court of Appeal; and to carry out that system the changes made in 1913 (now embodied in the *Revised Statutes of Ontario*, 1914, chapter 56) were mainly directed. By this last revision of the Judicature Act of Ontario the following results are obtained: (1) The Supreme Court of Ontario has become an actual living Court; it is no longer a mere name. All jurisdiction formerly exercised by the common law and equity courts is now exercised in the name of "the Supreme Court of Ontario" without any additions of a divisive character, such as, "High Court Division" or "Appellate Division"; no matter whether such jurisdiction is exercised by a single judge in court or in chambers, or by the Appellate Division, composed of four or five judges, the judgment or order of the Court is alike simply entitled "In the Supreme Court of Ontario." The name or names of the judges stated in the margin is the only distinguishing mark for determining by what particular branch of the Court any particular order or judgment is pronounced. This, of course, was the original aim and intention of the Judicature Act, but the actual realisation of the confessedly intended result was not in Ontario accomplished till the lapse of nearly a third of a century, so difficult is it to rid ourselves of the trammels of the past.

Having now glanced at the gradual development of the procedure in Ontario since 1881, we may proceed to consider what is the result in a practical way of what has been done.

Constitution of the Court.—One of the principal results has been, as already stated, that, at last, one Superior Court of Law and Equity has been established in Ontario. This Court, it is true, is still divided into Divisions, viz. "the High Court Division" and "the Appellate Division," but these two Divisions are no longer in any sense two separate Courts, but merely two departments of one and the same Court, viz. "The Supreme Court of Ontario," in which name both Divisions exercise jurisdiction.

To the High Court Division is assigned all the business of the Court as a Court of first instance. To the Appellate Division is assigned the appellate business of the Court, except appeals from judicial officers, which latter appeals are carried to a judge of the High Court Division.

In order to cope with the appellate business, the Appellate Division may and does sit in two Divisions, the first Division being composed of four or five of the judges expressly assigned to the Appellate Division, and any other Appellate Court that may be requisite being composed of four or five of the judges selected from the judges assigned to the High Court Division.

All judges assigned to the Appellate Division are *ex-officio* judges of the High Court Division, and *vice versa*.

Procedure.—All actions (except in certain cases to be hereafter mentioned) are commenced by writ of summons, whether the cause of action be legal or equitable. In certain classes of actions, *e.g.* (1) liquidated demands; (2) ejectment, and dower; (3) actions to enforce mortgages; the writ may be specially endorsed, and, in default of appearance, final judgment may be signed, as of course for the appropriate remedy, and execution may thereupon issue.

In actions to enforce mortgages, remedies of various kinds may be claimed and obtained in an action, *e.g.* a personal judgment on the covenant, ejectment, and a sale of the mortgaged premises or a foreclosure of the equity of redemption.

In actions of this kind, and some others to be mentioned, subsequent encumbrancers need not be made parties in the first instance, but the judgment may direct a reference to a master to inquire as to encumbrances, and the encumbrancers are added as parties in his office, served with the judgment, and given an opportunity to move against it, if so advised.

If there are no encumbrancers the account is taken, and the time for redemption appointed by the officer entering the judgment.

Where a foreclosure is claimed, the mortgagor or a subsequent encumbrancer, on payment of $80 into Court, is entitled on *præcipe* to have an order made for sale in lieu of foreclosure.

Exceptions to the Ordinary Mode of Commencing Actions.—There are certain excepted cases in which an action may be commenced otherwise than by writ of summons, *e.g.*:

(1) Actions to enforce mechanics' liens. This class of action is commenced by filing a statement of claim and proceeding to trial, and judgment, before an official referee in a summary way.

(2) Actions for the administration of a deceased person's estate.

(3) Actions for the partition of an estate.

Both of these actions may be commenced by the service of an originating notice of motion returnable in chambers on the party from whom an account is claimed, or, in case of partition, on some of the parties interested, and the judgment may be granted or refused as may seem proper. Where a judgment is granted, the officer to whom the cause is referred adds all other necessary parties as defendants, and the parties so added are given an opportunity to move against the judgment. Provision is made also for the giving of originating notices of motion for the summary determination of questions such as are provided for by the English Rules. In England, however, the procedure is by summons, whereas in Ontario it is by notice of motion.

Proceedings Subsequent to Writ.—In the case of actions for money, demands for which a writ is specially endorsed, a defendant is required with his appearance to file an affidavit showing that he has a defence on the merits. On this affidavit he may be cross-examined ; and the plaintiff, with or without such examination, can move for judgment in chambers, and if he can satisfy the Court that the defendant, by his own admissions, has really no defence, he may get judgment. But in such motions conflicting evidence will not be gone into, and if a *prima facie* defence is shown, it will usually be sufficient to defeat the motion ; but the plaintiff in such case is entitled to proceed to a speedy trial.

Default of Appearance.—Where the nature of the action is such that the claim can be, and is, specially endorsed, in default of appearance judgment may be signed as of course, as above mentioned. If, however, the claim is one that cannot be specially endorsed, then, on default of appearance, the plaintiff must file a statement of claim, and, in default of defence, he may note the pleadings closed and may set the cause down to be heard on motion for judgment, on which motion the allegations of facts contained in the statement of claim are taken as admitted by the defendant.

Statement of Claim.—The defendant having appeared, and the case not being one in which he can move for judgment as above mentioned, the next step is for the plaintiff to deliver a statement of claim, which is similar in form to that in use in England in like cases.

Default of Defence.—Where there is default in delivering a statement in defence, there are two methods of obtaining judgment:

(*a*) If the claim is of the nature that would permit of its being specially endorsed on the writ of summons, then, in default of defence, judgment may be signed, as of course, for the appropriate remedy, as on default of appearance.

(*b*) If the claim is such that it could not be specially endorsed, then the plaintiff may note the pleadings closed, and set down the cause on motion for judgment. Where there are other defendants as to whom the cause has to be tried, then the motion may be made at the trial of the action, otherwise it may be made to a judge in court held weekly for the hearing of such motions.

Counter-claim.—In lieu of, or in addition to, a defence, the defendant may file a counter-claim either against the plaintiff alone, or the plaintiff and some other person or persons, the procedure on counter-claims being similar to that in use in England.

Third Parties.—A defendant may also bring in third parties as against whom he claims, either (*a*) contribution, (*b*) indemnity, or (*c*) relief over.

This may be done by service of a notice on the third party, for which no leave is required, in which respect the procedure varies from the English practice. Of course, if the notice is claimed to have been improperly given it is liable to be moved against and set aside. The right to claim relief over is not given by the English Rules except by way of contribution or indemnity. In other respects the procedure against third parties is similar to that under the English Rules.

Reply.—To the defence a plaintiff may, if he see fit, deliver a reply or a joinder of issue. After the reply or when the time for delivering a reply is up, the pleadings are closed, and two courses may be taken for obtaining judgment:

(*a*) By motion for judgment, which is only appropriate where there are no facts in dispute or proof of deeds or documentary evidence is necessary only as against infants.

(*b*) By trial of the action.

Motions for Judgment.—A Court is held twice a week, presided over by a single judge for the hearing of motions for judgment, and other business. Provision is made by the Ontario Rules for the summary disposition of questions of law arising on the pleadings but in practice it is rarely resorted to.

Trials.—A trial may be had in two ways: (1) before a judge alone, or (2) before a judge and jury.

Whether the action be tried before a judge alone or a judge and jury the evidence is usually taken down in shorthand by one of the official court stenographers appointed by the Government for the various courts.

Trials before a Judge Alone.—With the exception of actions hereafter mentioned, all actions are usually tried before a judge alone. All equity actions must be so tried; but in other actions either party may give notice for a trial by jury, which, however, may be set aside, or the jury may be dispensed with by the judge presiding at the trial. Actions against municipal corporations for damages for default or repair of roads, etc., must be tried by a judge alone.

Trials before Judge and Jury.—Actions of libel, slander, criminal conversation, malicious arrest, malicious prosecution, and false imprisonment must be tried by jury, unless both parties waive such trial, in which case they are triable by a judge alone.

In other cases the right of a party to have a trial by jury is subject to the discretion of the Court.

Sessions for Trials.—As a rule, four sessions of the Court are annually held for trials at each of the county towns throughout the Province. Two of these sessions are for trials by jury, and two for trials without a jury; but in some small places where business is light a single session for trial of actions both with and without a jury is sometimes held in lieu of two separate sessions.

Appeals.—From judgments or orders pronounced at a trial, or by a judge in the weekly Court, or in chambers, an appeal lies to the Appellate Division. In the case of appeals from judgments the lodging of the appeal operates as a stay of execution of the judgment or order appealed from pending the appeal. No security for costs of the appeal is required. Five copies (usually type-written) of the pleadings and evidence and judgment appealed from are required for the use of the judges. This is the one and only appeal in the Provincial Court which is now admissible. From the judgment of the Appellate Division in certain cases a further appeal may be had to the Supreme Court of Canada, or by leave to His Majesty in his Privy Council.

Appeals from judicial officers are heard before a judge of the High Court Division stiting in the weekly Court.

This account of legal procedure in Ontario would not be complete without a brief reference to the local Courts. These are of three kinds: (*a*) County Courts, (*b*) Division Courts, (*c*) Surrogate Courts.

County Courts.—One of these Courts is established in each county or union of counties throughout the Province. These may be briefly described as miniature Supreme Courts. Their jurisdiction is defined by statute, and extends in a limited degree to legal and equitable causes of action. The procedure laid down for the Supreme Court of Ontario applies to these Courts. Trials may be had on the same terms as in the Supreme Court with or without a jury, and subject to the like judicial discretion as in the Supreme Court.

Appeals from County Courts and Motions for New Trials.—All appeals from judges of County Courts are to the Appellate Division of the Supreme Court of Ontario, to which tribunal also all motions for a new trial in County Court actions must be made. There is therefore no longer the anomalous procedure of appealing from the judge at the trial to the same individual sitting *in banc*. All orders of a final nature made by judges of County Courts are also appealable to the Appellate Division of the Supreme Court.

Division Courts.—Of these there are several in each county. They have a still more limited jurisdiction. Their procedure is of an informal and more summary character than that of the County Courts. Trials with a jury of five are in certain cases allowed, but the cases are usually heard and determined by the judge in a summary way. Where the amount involved exceeds $100 exclusive of costs, an appeal lies to the Appellate Division of the Supreme Court of Ontario; but in all other cases the judge's decision is final. The judges of the various County Courts are also the judges of the Division Courts in their respective counties.

Surrogate Courts.—In every county or union of counties a Surrogate Court is established. These Courts, as the name imports, are for the grant of probate or administration. The procedure therein is based on that of the Probate Division of the English Court. But in Ontario there is no Central Court of Probate. But there is an officer in Toronto styled the Surrogate Clerk, to whom has to be sent notice of all applications for probate or administration made in every Surrogate Court; and in this way the duplication of grants of administration or probate is prevented.

Matrimonial Court.—In Ontario there is no Matrimonial Court—and all applications for divorce or nullity of marriage have, as regards residents in Ontario, to be made to the Parliament of Canada. It at one time was suggested that the former Court of Chancery had a matrimonial jurisdiction, but the trend of judicial opinion now is that it had not, nor has the Supreme Court of Ontario such jurisdiction. An Act of the Provincial Legislature purporting to empower the Supreme Court of Ontario in certain cases to dissolve *de facto* marriages has been recently considered to be *ultra vires* and an invasion of the authority of the Dominion Parliament, to which by the B.N.A. Act, s. 91 (26), jurisdiction in "Marriage and Divorce" is committed. The question was referred to the Appellate Division for its decision, and has been argued but has not been disposed of: *Peppiatt* v. *Peppiatt*.

Procedure in Other Provinces.—What has been said regarding Ontario has a more or less general application to the other English-speaking provinces of the Dominion, in some of which, however, the English Act and rules of practice have been more closely followed than in Ontario.

In a book[1] recently published by me on the Judicature Act of Ontario I have set out in a comparative table the way the English Rules have been adopted in the provinces of British Columbia, Manitoba, New Brunswick, Nova Scotia, Saskatchewan and Ontario, to which the reader is referred. In the following provinces Matrimonial Courts exist, which owe their existence to legislation, prior to the Confederation Act, viz.: British Columbia, Nova Scotia, New Brunswick and Prince Edward Island. These Courts have a jurisdiction, limited by statute, in matrimonial causes; the jurisdiction of the British Columbia Court being similar to that of the English Court under the statute of the United Kingdom, 1858.

This brief sketch of the civil procedure in the Courts of the English-speaking provinces of the Dominion of Canada would not be complete without a reference to the Federal Courts of the Dominion. These are two in number, viz. the Supreme Court of Canada and the Exchequer Court of Canada.

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[1] *The Judicature Act of Ontario and Consolidated Rules of Procedure of the Supreme Court of Ontario.* (London: Sweet & Maxwell. 75s.)

The Supreme Court of Canada is the Court of Appeal from the Superior Courts of last resort in the various provinces. Its procedure is based to some extent on that of the Judicial Committee of the Privy Council, but in the giving of judgment the judges who differ from the majority of the Court express their dissent. The Supreme Court of Canada has also a consultative jurisdiction on questions of law arising between the provinces and the Dominion, and as to the constitutionality of statutes passed by the Dominion Parliament, or Provincial Legislatures, or as to their respective legislative powers. By leave an appeal lies from the decisions of this Court to His Majesty in his Privy Council.

The Exchequer Court of Canada is a Court of first instance. It has jurisdiction to entertain actions brought against the Crown as represented by the Dominion Government; also claims for property expropriated or damaged by expropriation for the public purposes of the Dominion, claims arising from negligence in the execution of public works of the Dominion, and claims of the Crown as represented by the Dominion Governor against private persons or corporations.

It has also jurisdiction to adjudicate the claims of the heirs or devisees or assignees of persons entitled to grants of public lands of the Dominion, and to determine to whom the patent therefor is to issue.

It has also jurisdiction to adjudicate as to conflicting rights to patents for inventions, copyrights, trade marks, etc., or to adjudicate as to the validity of such patents or copyrights or trade marks and to restrain infringement thereof.

It may also give relief to the Crown as represented by the Dominion Government by way of interpleader in case of conflicting claims to goods or money in the lands of the Crown.

It has also jurisdiction to determine the value of lands expropriated by the Dominion Government for public purposes.

It has also jurisdiction over railways subject to the authority of the Dominion Parliament, and all those incorporated by the authority of the Dominion Government or declared to be for the general benefit of Canada as distinguished from mere provincial railways. It may enforce mortgages against such companies by sale, or foreclosure, and the appointment of receivers, and may wind up such companies when insolvent. It has also jurisdiction in matters of revenue, and also in controversies between the Dominion and any province.

This Court has also an admiralty jurisdiction. The jurisdiction of the Court in all matters aforesaid extends throughout the Dominion, and its decisions are subject to appeal to the Supreme Court of Canada.

In conclusion, it may be well to note that the variations from the English system of procedure which have been made in the Provinces of Canada, where the English judicature system has been in the main adopted, have been generally in the direction of the simplification of the practice of the Courts. Some of the variations thus made seem to be deserving of attention in other jurisdictions, with the view to simplifying the procedure in civil Courts throughout the Empire, and bringing it into still closer harmony, if not absolute uniformity.

THE CASE-METHOD OF TEACHING LAW.

[*Contributed by* PROFESSOR COURTNEY KENNY.]

IN every nation the advance of civilisation is dependent on law—on the increasing wisdom with which the laws are framed and the increasing efficiency with which they are enforced. Both these factors, again, depend largely upon the merits of the training which those men have received who are concerned with the practice, or with the development, of law. Hence during the nineteenth century the subject of legal education has assumed an unprecedented importance in all the leading nations of the world. The fact is vividly illustrated by the statistics of the American Republic. Where in 1860 there were only twenty-three schools of law and only a thousand students in them, there now are more than a hundred and fifty such schools instructing more than twenty thousand students.

The Carnegie Foundation's Inquiry.—The importance of this vast assembly of such institutions attracted the attention of the great "Carnegie Foundation for the Advancement of Teaching," which expends much of its income in the study of educational questions. In 1913 its trustees adopted a scheme for investigating the condition of legal education—the training of young lawyers (both in and out of law-schools), and the examinations by which they are admitted to practise—in all the forty-nine jurisdictions of the United States. The task was carried out with such energy and success that a mass of materials was accumulated too enormous and complex for it to be possible to present a full report upon them with any promptitude. But even a casual view of these materials disclosed the fact that at the outset a primary question would demand consideration. It was the fundamental controversy which divides the lawyers and law-schools of America into two groups—those who admire, and those who depreciate, that "case-method" of instruction which it is the glory of Harvard University to have created and developed.

Practical Training.—Without waiting, then, for the publication of their General Report, the Carnegie Trustees determined to have this great controversy reported upon. And, in view of the difficulty of finding any prominent American lawyer who was not already committed to the one view of it or to the other, they entrusted the task to a European jurist—the well-known Professor Josef Redlich, of Vienna.[1] He proceeded to America in October 1913, spent two months in visiting law-schools in various parts of the States, and conferred with many leading lawyers and judges. He soon found that there are three methods of instruction by which a young American can qualify himself to pass the bar examination of his particular State, and so enter upon legal practice within its territory. The simplest and cheapest of the three is the old one of eighteenth-century England—to seek apprenticeship instead of education, ignore schools of law and professors of law, and go directly to participation in the actual business of some counsel or attorney who will admit the pupil to his chambers or his office. And with this merely empirical training " a great number of lawyers in the United States " (so Herr Redlich ascertained) still content themselves. Indeed even in England no less an authority than Lord Cozens-Hardy—if I remember accurately a recent address of his—is similarly content with it ; and insists that " law cannot be taught," but can be mastered only by actually dealing with it, just as swimming can be learned only in the water.

Academic Instruction.—But the great majority of those who, whether in Europe or in America, have considered the subject, are agreed that, though a period of this practical apprenticeship is indispensable to the making of a successful lawyer, its length may be abridged, and its utility greatly increased, by a previous course of systematic academical instruction. Without this preparation, the work in chambers, as Herr Redlich vividly puts it—

> takes away from legal education . . . every characteristic of scientific teaching, since from the outset it leaves to chance the amount of legal knowledge which the student can actually acquire. Every possibility

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[1] His report entitled *The Common Law and the Case-Method in American University Law Schools* was published by the Carnegie Foundation as " Bulletin No. 8."

> of methodically covering the entire field of the law as a great whole, logically and historically co-ordinated in all its parts, is lacking here. From the outset everything is based upon the intellectual power and the independent character of the individual student; upon that depends the extent to which, through study of the law cases, he can master common law and equity. In this apprenticeship each young lawyer must conquer the legal world and the legal way of thinking, each time newly for himself; must create for himself, . . . so far as he can, principles and system (p. 38).

And again—

> Practice, the routine of the law office, . . . is not real instruction. Important though it is, it can . . . supply only empiricism—that is to say, habitual use and practical familiarity joined to irregular acquisition of knowledge. No matter how indispensable is this stage in the training of the legal practitioner, it presupposes the existence of, and is made vastly more effective by, a preliminary course of systematic and theoretical instruction in the principles of law in its entire compass.

The Influence of Blackstone.—Hence in the United States, where lawyers have always played so prominent a part, the generation that saw the nation's birth as an independent Republic saw also the institution of law-lectures in various parts of its territory. The innovation was stimulated, it would seem, by the publication of Blackstone's *Commentaries*. They had obtained an immediate vogue in America. "Nearly as many sold in America as in England," says Burke in the great speech of 1775; hundreds of copies being imported from England, and others being printed in the States themselves. When Blackstone died, he probably had more readers across the Atlantic than in Europe. James Otis, the famous advocate-general of Massachusetts, recommended the book, saying, "Had these volumes been written when I began to study law, years of my life would have been saved to me."[1]

The Lecture Method.—This institution of law-lectures, after the Oxford example, was an important step. No one has listened to Sohm or Wach at Leipsic, to Zitelmann at Bonn, to Liszt at Berlin, or to Mr. J. D. Mayne in our own Inns of Court, without realising the vast power which an eloquent and animated lecturer may exercise, both in imbuing his hearers with the information he is endeavouring to impart, and also in inspiring them with an eagerness to press on to fuller knowledge. But many lecturers are neither animated nor eloquent; and many hearers have neither memory to retain, nor acuteness to grasp, ideas which have been but once presented to their minds, and this only in the rapidity of an oral address. Hence the law-teachers of America soon found it necessary to carry their work into a second and more complex stage. They came to require the student not merely to listen to their lectures, but also to peruse specified portions of text-books; and, moreover, to submit to having his knowledge of these portions tested by being catechised along with his class-fellows. Five hours of private reading to an hour of lecture and an hour of "recitation" (*i.e.* catechisation) were, I was told in Boston by a prominent teacher, reckoned as the desirable proportions. Hence, unlike German professors, who almost ignore text-books, the American teachers of the first half of the nineteenth century came—like Greenleaf, the greatest of them all—to throw their lectures very largely into the form of a preliminary commentary on the chapters that were thus about to be studied.

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[1] Dr. Redlich's note on Blackstone (pp. 62–3) is somewhat confused. After telling us truly how, by Viner's endowment, Blackstone in 1758 "became the first professor of the common law at an English university," he states in the very same paragraph that "Chairs of common law in Oxford and Cambridge were established only in the second half of the nineteenth century." Yet the Cambridge chair, though younger than the Vinerian, was established—by, as tradition says, the instigation of Pitt himself—at the close of the eighteenth century.

The Columbia Law-School.—By no one, probably, was this second method of instruction practised with greater success than by Dr. Theodore Dwight of New York, in the great University which then was only "Columbia College." Nowhere in Germany or France or England have I listened to any lessons in law so telling as those which, nearly thirty years ago, I heard in his class-room. He had raised the Columbia law-school from insignificance and made it the largest in all America; with much more than double the number of law-students that any of its rivals possessed. His class-room held two hundred hearers; but as he had twice that number of students, each lecture had to be delivered twice. In a lecture he would summarise and criticise some thirty pages of Blackstone; and then, on the next lecture day, after the men had worked through these pages at home, an hour would be devoted to questions. The students were questioned in the alphabetical order of their names, starting on each day from the name last reached at the last questioning; so that no one could escape being tested. Dwight would comment freely on their answers, and sometimes spend several minutes in giving the correct answer to a question that had proved difficult. No oratory was attempted: he never raised his voice, he used no gestures, he sat still in his chair. But there was no desk or table to impede his hearers' full view of him; his voice was peculiarly clear; every sentence was lucid; and every point was driven home. Beyond all this, there was in the old man that rare gift of personal magnetism which is the secret of successful oratory. No wonder that he was the best-paid teacher of law—or, indeed, as I was told, of any subject whatever—in America; although, as he complained to me, the College trustees had long ago reduced his emoluments, "and cut me down to the salary of a judge of the Supreme Court"—only some £3,500 per annum! Under such financial conditions it was not difficult to foresee that law-schools might soon acquire in America a greater importance than they had as yet done in England.

Case-Books.—But an innovation, pregnant with great results, was meanwhile working its way. A third and unprecedented mode of instruction, devised by one man's bold originality, had already been initiated by Christopher Columbus Langdell as far back as 1871, on his becoming a professor of law at Harvard. Years earlier, when commencing his own legal studies, he had made trial of the existing law-schools; and had found that they did not afford him the help he desired. He had consequently invented for himself this novel scheme of study. Its characteristic was that it made the library take the place of the lecture-room. Its theoretical basis was, in his own words, the fact that—

> to have such a mastery of the principles of law as to be able to apply them with facility and certainty to the ever-tangled skein of human affairs is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. . . . Moreover, the number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension.[1]

Hence he considered that "the shortest and best way of mastering these doctrines must be by studying the judicial decisions in which they have been laid down." The objection at once arose, that the mass of Anglo-American case-law is so prodigiously vast that the disheartened student would soon lose himself in the labyrinth of precedents, the wilderness of single instances. "No," answered Langdell, "the vast majority of reported cases are useless—worse than useless—for the systematic law-student." Consequently he proceeded to make, for the particular subject which he was first going to teach—the law of contracts—a selection of such cases as were really important; and then to arrange these in a systematic sequence. This selection, published in 1871, was the starting-point of a new and invaluable form of legal literature. So many imitators of Langdell have contributed to it, that their various case-books (upwards of a hundred in number) now cover—in Dr. Redlich's words—"pretty nearly the whole domain of private, criminal, and constitutional law, and of procedure." Following the example of Langdell, these books give nothing but the actual report of each case; they omit the headnotes. Langdell aimed at compelling every student to perform for himself the task of eliciting from the report the precise *ratio decidendi* of the decision—in other words, of making his own headnote. In Dr. Redlich's language, each student must attempt "the analytical decomposition of the case and the distillation of the legal principle contained in it"—watched and criticised, of course, by his teacher.

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[1] Quoted by Professor Redlich at p. 11.

Opposition to the Case-Method.—This radical innovation aroused opposition and satire. Some years elapsed before even Langdell's own colleagues at Harvard were unanimous in adopting it. Sixteen years after its commencement I was assured, on one of my visits to America, that not a single other law-school had adopted it or had even accepted as a teacher any lawyer trained by it. And though it had admittedly enabled all Harvard graduates in law to obtain employment readily, yet critics alleged that this was only because these graduates were not yet too numerous to find places in the comparatively few firms so busy as to need a special clerk for the business of hunting-up cases and noting briefs. The far more extensive demand for young lawyers competent to help in an office by interviewing clients and conducting minor cases without supervision, the Harvard school (so the critics alleged) would not be able to supply. As one of the men then (1887) best known in the legal circles of Boston said to me, "Langdell's men at the best are solid and scholarly; at the worst, they are bookworms. Brilliancy they will never show, either in political or even in legal life." This general opposition to the method lasted perhaps longer than it otherwise would have done, on account of Langdell's personal manner as a teacher being (as at least it seemed to me) weak and unimpressive, delightful though he was in private conversation. His physical health had been undermined in his early years by over-study and excessive frugality of living. The legal practitioners of Boston viewed Langdell's method as so little likely to train their sons successfully that they founded in the University of Boston, close at hand to Harvard, a rival law-school; and this, at first, drew away more than half of Langdell's students.

Present Position of "Case-Method."—But the tide turned. Forty years' experience has now attested the solid value of the case-method. Since its introduction at Harvard that law-school has quintupled the number of its students; and has come to be ranked, even by European observers like Sir Frederick Pollock, as giving a more systematic training in Anglo-American law than can be obtained in any other place in the world. Dr. Redlich goes so far as to declare the practical utility of the case-method to be no longer seriously disputed by any one in the United States (p. 35):

> the fight for and against it has been just as much settled in favour of the method, among practitioners as it was long ago among university law-teachers.

At the same time he admits (pp. 59, 69) that many of the less important law-schools still decline to adopt it, and prefer the older methods of instruction. And it must be remembered that of the hundred and fifty American law-schools, Dr. Redlich visited only ten; and four of these ten did not employ the case-system at all, whilst some of the remaining six did not employ it wholly (p. vi). Accordingly his opinion of its complete victory is evidently somewhat exaggerated; and we may more safely trust the view which the wider experience of the President of the Carnegie Foundation has led him to take (p. v), viz. that teachers of law in the United States are still divided on the subject.

If, then, the controversy be still undecided, what is to be said on both sides?

Merits of the Method.—The pre-eminent merit of the case-method is the intellectual drill through which its students are made to pass; which imbues them—or, at any rate, the bulk of them—with a legal tone of mind and forensic habits of reasoning. For it rightly treats the communication of legal knowledge as less important than the development of legal acumen. As Dr. Redlich puts it, its great success lies in the fact that—

> it prepares the student in precisely the way which, in a country of case-law, leads to full powers of legal understanding and legal acumen; that is to say, by making the law pupil familiar with the law through incessant practice in the analysis of law cases, where the concepts, principles and rules of Anglo-American law are recorded. . . . It really teaches him to think in the way that any practical lawyer—whether dealing with written or with unwritten law—ought to and has to think (p. 39).

So far as it succeeds in doing this, it undoubtedly achieves the highest result that a school of law can aim at. No one can have much experience of either mercantile or municipal affairs without discovering that the most useful legal adviser is—not he who can quote many cases, all cognate yet none of them quite in point—but he who can truthfully say, "I don't know whether this question has ever come into court; but, if it did come, I know quite well the way in which the judges would be sure to look at it." And only the latter type of man is able to keep his footing, in forensic struggle, by rapid insight into the real drift of cases which his opponent suddenly cites against him. For, as Lord Abinger's long forensic experience had taught him, "The lawyers least to be depended on are those who are in constant pursuit of 'cases in point' to govern their opinion; and who therefore seldom have sufficient knowledge of principles to be able to judge for themselves" (*Life*, p. 45). Indeed, as shrewd Counsellor Pleydell told Colonel Mannering when they sat to deal with the prosecution against Dirk Hatteraick, "Law is like laudanum. It's much more easy to use it as a quack does, than to learn to apply it like a physician." Every provincial county-court, every rural petty-session, affords daily illustrations of the truth of the Counsellor's words.

If, then, the case-method, in the hands of skilled teachers like Langdell and Ames, has the supreme merit of being able to imbue an apt student with these invaluable powers of analysis and discrimination, is not the controversy closed? Can opponents have any ground of attack remaining?

The wide acceptance which, within a single generation, Langdell's method did obtain—whether in an unqualified or only a qualified form, and whether exclusively or only in combination with other methods—in the principal American law-schools is a conclusive proof that it possesses salient advantages. But there still remains the question whether it therefore deserves that universal and exclusive adoption which is claimed for it by its extreme supporters—Dr. Redlich's "many contemporary law-teachers in America who would preserve the exclusiveness of the case-method as a unique hermetically sealed system of teaching," and would reject all lectures as an obsolete mediæval means of instruction (p. 43).

Disadvantages of the Method.—It is obvious that the case-method involves an unusual strain on the instructor, and cannot effectively be adopted in law-schools that are too poor to attract teachers of a calibre at all approaching that of the great men who have rendered Harvard famous. It is almost equally obvious that its best results cannot be obtained in a law-school whose staff of teachers is so small in proportion to the number of students that the classes are extremely large. If case-teaching is given to a hundred hearers at once, then—says Dr. Redlich (p. 51)—"inevitably only a very small fraction of those present can participate actively in the analysis of the cases." In the *seminars* of Continental universities, it is held essential that the participants shall be few in number. It is of course otherwise in ordinary lecturing; the seven hundred hearers of Harnack, or the thousand hearers of Cousin, arouse the teacher and render his words the more impressive. But these difficulties, though real, are merely local; and do not affect the inherent value of Langdell's method. A third objection which again though valid is similarly only of limited application, lies in the slowness with which, under the case-method, the pupil acquires his legal knowledge. True, this slowness is due to the very thoroughness of the command he acquires over that knowledge, and to the invaluable mental drill whereby he acquires it. But in all countries a large (if not a preponderant) number of students prefer information to intelligence; and seek out the teachers who will fill them with the greatest mass of facts in the smallest time, reckless whether this process of repletion strengthen the mental powers or weaken them. For any law-schools that seek to meet this demand for celerity the case-method is assuredly unsuitable.

Inappropriate Method for Beginners.—Let us pass to an objection that lies deeper than these three. The difficulties which this method presents to beginners must always render it an inappropriate method for the actual commencement of the study of law. This is vividly put by Dr. Redlich :

> I am positive that, if all first attempts are difficult, this is especially true of legal education according to the case-method. Eminent professors of law have repeatedly explained to me that it takes a long time before the excellent effects of instruction by law cases are evident. The beginners are, as a rule, rather confused by what is demanded of them in class, and usually for a considerable period only the particularly quick and talented students take part in the debate ; but after some weeks or months, things become clearer to the others also (p. 29).

For then the students begin to grasp what it is all about, and there soon follows the hearty co-operation of the majority. But, before this later stage is reached—

> Confusion and obscurity—as is admitted by even the most zealous advocates of the exclusive case-method—trouble most of the young men, . . . during a large part of their first year, in their attempts to analyse the cases (p. 44).

An illustration of this difficulty is afforded by the fact that of the students who attended Langdell's first class, only seven persevered to the last lecture of the course (p. 13). A very similar experience was that of his first English imitator—an experienced lawyer of marked intellectual powers, the late Mr. Gerard Finch. A visit to Harvard, after the case-method had become well established there, impressed him so deeply with its merits that he resolved to introduce it into England. For this purpose he compiled a stately volume of cases in the law of contract—known still to many readers by the revised edition of it which we owe to Mr. R. T. Wright and Professor Buckland. In 1885 he made part of this volume the basis of a course of lectures at Cambridge, on the method of Langdell. But the unpreparedness of his pupils, and probably also their English shyness, frustrated his hopes. According to tradition, the course commenced with forty hearers, but ended with about one-tenth of that number. So far as I can learn, Mr. Finch did not in his later teaching resume the Harvard method. In a law-school whose students usually give only a single year to English law, that method is out of place.

To obviate all such disappointments, instruction by the case-method should, as Dr. Redlich well says (p. 44), be prefaced by a *Propädeutik*—a course of lectures affording a brief scientific survey of legal institutions, postulates, concepts, and terminology. For after such a preparation the subsequent accumulations of legal material, acquired daily through the analytical exercises, would from the beginning be obtained systematically and with a consciousness of purpose. Yet even this preparation would not enable every student to reap the full advantages of the case-method. When the brilliant results it has effected at Harvard are cited for imitation by other schools of law, it must be remembered that they have been effected, not only by an exceptional body of teachers, but also upon an exceptional body of pupils—men of more advanced age, wider education, and more unremitting zeal than a law-school usually possesses. Mr. Finch found that " nearly all the students of law at Harvard have taken a degree in Arts before entering the law-school." And so intense is their industry, Dr. Redlich finds, that they are content to spend almost the entire day in study, and (p. 32) " take little or no part in the athletics which bulk so large in the life " of the Harvard men who belong to other Faculties. Rare and happy —on this side, at least, of the Atlantic—are the academical teachers of law whose pupils come to them with minds already so well trained, or with such unresting eagerness to carry the training still further.

Omissions Due to Method.—Another obvious criticism is that, in this age of prolific legislatures, a lawyer who knows case-law knows only half the law. Dr. Redlich, familiar with the codifications of continental Europe, is so dazzled by the vast Anglo-American literature of judicial decisions, that he seems at times to forget that even in " a country of case-law " such decisions are far from being the one and only form which law takes. The teacher who should attempt to teach the law of real property, or criminal law, from judicial decisions alone, and ignore the long array of statutes which have gradually re-cast both these fields of learning, would soon find that his labour had been thrown away. Still more futile would the effort be in dealing with such modern branches as the law of public health or of municipal organisation, where the whole framework is a creation of the legislature.

Again, it must be borne in mind that the case-method is designed only for teaching Anglo-American law—or, rather, for teaching the judge-made half of that law. Yet even for training American or English lawyers, a true university has not achieved its task if it has not carried them into a wider range than that of the legal rules of their own nation. It must, as Dr. Redlich says, deepen their understanding of their own law by giving them an insight into the law of other peoples. It ought to familiarise its students with some second system of law—by choice, "the Roman, which has shaped the history of humanity." And it should teach them "the general theory of law, as one of the great dominating phenomena of human civilisation and human thought" (p. 45). May we not add, little as American universities encourage the suggestion, that it should also bring before them an outline of that law of nations which fills a daily increasing place in the disputes both of jurists and of statesmen? Dr. Redlich himself would propose to postpone all these less directly lucrative subjects of instruction until after the student has received his Langdellian drill in the law of the country where he is going to practise. But a student so well trained for practice has strong pecuniary temptations to enter upon it at once, without spending a year upon theoretical instruction that can bring no immediate grist to the mill. Yet this instruction is so necessary a part of any legal education which deserves to have the hall-mark of a university set upon it, that English academical usage seems to act prudently in making the student go through these subjects at the outset, before he enters on the branch of learning which leads directly to his professional career.

Personal Element.—Finally let us remember that, however great is the value of Langdell's method, it is valuable only when practised as he practised it. His justly high repute has led some students, perhaps some teachers, into imitations that do not really imitate him. To become able to balance the conflicting arguments of contending counsel, and analyse the resulting judgment so as to elicit its *ratio decidendi*, is a great thing. But it is a small thing to commit to memory the name of a case unread (even though, as I recall one student doing, you memorise the numbers of the volume and page as well). It is a small thing to know partly, or even wholly, the facts of a case, without knowing the principle that the judge applied to them; as when I once read in an answer in an honours examination "an owner was held liable for damage done by a bay horse; but there is a case about a black mare, in which the owner won." Nor is it a great thing to study as did a reader to whom I once offered help, on his telling me that he was pursuing the case-method. He replied, "I need no help. All that I do is to copy out the reporter's headnote." If so, he was not really studying the case itself at all, but only reading a diffuse form of text-book law.

Summing up his review of the case-method, Dr. Redlich says: "Not Induction, as Langdell and his successors would have us believe, but Empiricism, is in my opinion the characteristic feature of this method of instruction" (p. 57). The remark recalls the sarcasm of the late Lord Collins, who (in a speech which I heard him deliver) somewhat brusquely identified this plan of learning law by studying individual cases with Mr. Squeers' thoroughly empirical method of instruction; which impressed the word "window" on a boy's mind by making him rub a particular one. His lordship held, like his American colleague Judge Baldwin, that "no science can be learned purely from particulars. The universals must be studied to discover what the particulars mean" (cited by Redlich, p. 41).

Indeed Dr. Redlich inclines to regard Langdell's "actual real discovery" in legal education, his chief step forward, as consisting simply in the invention of the modern case-book, which has given America a new and valuable form of legal literature. But here again there may be imitators of Langdell who do not really imitate him. Case-books are not Langdellian if they save the student's exercise of thought; whether by cutting down the statement of facts to those essential to the decision, or by omitting the arguments of the unsuccessful litigant and the judgment of any dissentient minority of judges. The reader is thus led to mistake the very nature of case-law; to treat the decision as a foregone conclusion, and to forget that if there had not been a doubt there would not have been a litigation.

THE HUMAN LEOPARDS OF SIERRA LEONE.[1]

[*Contributed by* A. Gray, Esq., C.B., K.C.]

Attentive readers of the annual Reviews of Legislation in this Journal will have noticed occasional references to laws of Sierra Leone enacted for the suppression of certain secret societies existing for murder and cannibalism. How far these societies have permeated is doubtful; the most fruitful soil is the Sherbro hinterland, and chiefly the Imperri district. They take their names from the animals whose skins are used to disguise the murderers, the most notorious being the Human Leopard Society, of which the Alligator and Baboon societies are either branches or imitators. All of them are offshoots of the ancient Poro confederacy which has for centuries wielded secret and mysterious authority over the Sierra Leone tribes; every member of the Human Leopard Society is also a member of the Poro. This high tribunal holds its court in a secret enclosure in the bush, where no profane foot may enter. One of its chief functions is to initiate boys into certain mysteries on attaining or approaching manhood, to train them in dancing, singing and other accomplishments, such as the preparation of fetish medicines, and to imbue them with the idea of the power and authority of the Poro. It is also a court for what passes as justice; and in former days one haled before it was, in most cases, seen no more. The members of the Poro are of three classes: a menial class, a devil class, and a chiefs' class. The last mentioned rules the confederacy, and before the establishment of the British protectorate ruled the country.

Fetish Origin.—The history of the Human Leopard Society is interesting from the point of view of anthropology. The murders have their origin in cannibalism and fetish; it may even be said that the ultimate origin is fetish alone, because here as elsewhere human flesh is eaten, not as mere food, but ceremonially; it is itself fetish, which, according to Sir W. Griffith's opinion, is believed to have powers of promoting virility. "Whether that was the original idea when the first person fell a victim to the Human Leopards may be questioned. Cannibalism is probably only a bye-product in these murders. Originally it may have been to bind the murderers together and so preserve inviolable secrecy that each member of the Society partook of a portion of the flesh; or it may have been to continue the leopard-acting, *i.e.* by devouring the prey; or it may have been with a combination of these ideas that cannibalism originated." The murdered body is indeed wanted for the preparation of a fetish medicine of more general efficacy. This is Borfima (*boreh-fima*, "medicine bag"), a package usually bound with leather containing "white of an egg, blood, fat and other parts of a human being, the blood of a cock, and a few grains of rice." This is "an all-powerful instrument in the hands of its owner, it will make him rich and powerful, it will help him in cases in the White Man's court," etc. The trouble with this as with other fetishes is that it is apt to fail in its duties; and the negro mind, instead of engineering success by other means, turns again to the fetish, and restores its efficacy by further murder.

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[1] *Human Leopards.* By K. J. Beatty. (London: Hugh Rees, Limited, 1915.)

Work of Human Leopard Society.—The Human Leopard Society has probably not existed for more than fifty years; it first became notorious in 1891. During the years of the present century it has terrorised large provinces of the Protectorate. Some cases of murder were prosecuted to conviction, and the evidence in these, on being pursued in other directions, led to the discovery that during the five years preceding 1912 upwards of thirty other murders had been committed. Upwards of 336 persons were arrested, of whom 108 were committed for trial before a special commission, over which Sir W. Brandforth Griffith presided, and of which Mr. Beatty, the author of the book before us, was a member. Nine men were ultimately executed, others being sent to penal servitude or deported.

Mr. Beatty gives a vivid summary of the evidence in some half-dozen of these cases. A notable feature in all is that the native chiefs, even of the highest degree, are members of the murder society and principal participants in the crimes. When the *borfima* requires invigoration a secret meeting is held in the bush, at which some member, maybe a chief himself, is called upon to provide the victim. If he protests, he is told that if he fails he will himself be taken. None dares refuse, and the unfortunate person designated yields to the sacrifice of his son, daughter, or nephew. The murder is done at night by persons attired in the leopard disguise, the *borfima* is renewed, and the flesh is distributed among the members. One of the cases had an added interest, the accused being a Christian missioner. A charge of murder failing, he was tried on the charge of having belonged to a Human Leopard Society, and the Court, not being satisfied of his innocence, ordered him to be deported to America, where by his eloquence he has since attracted large audiences and collected much money for mission purposes.

The Tongo Players.—The events following the outbreak of 1891, already alluded to, are of special interest to administrators and legislators. Murders had been committed by the Human Leopards, but at that time native society, not yet cowed, determined to avenge itself. The Tongo players, another fetish association, were called in. The medicine-men of the body held secret court in the bush of the affected district, where they prepared their medicine and whence they sent out their spies to the villages. The villagers were then summoned to attend at an open space, where those designated by the spies were called forth and subjected to the time-honoured ordeal of boiling oil. The burnt hand being proof of guilt, the wretched men were first fined and then burned to death. On this occasion upwards of eighty persons suffered, *including* the chief who had called in the Tongo players. It is curious to note that the Tongo players in carrying out this grim *auto da fé* also wore the leopard insignia. It was an internecine war, fetish against fetish. What action did the Government take? Without further inquiry as it would seem, they issued a Proclamation (May 1892) expelling from the Colony the Tongo players. Mr. Beatty leaves it to be understood that they were in fact expelled, and continues: "With all dread of the Tongo players removed, cannibalism burst out afresh towards the end of 1894, and at the beginning of 1895 a number of murders took place," which led to the passing in that year of the first Human Leopard Society Ordinance. This and the amending Ordinances made it an offence with severe penalties to belong to a murder society, or to possess any of the society's insignia, weapons, or medicine.

Attitude of the Government.—Mr. Beatty seems to think that the Proclamation against the Tongo players was a mistake, and I am inclined to agree. At any rate, the Government might have taken time to see whether the rough retributive justice attained its object of crushing the Human Leopards; at the moment they ought to have instituted an exhaustive inquiry into the murders and into the organisation of both the Human Leopard and Tongo Societies. On behalf of the Government it may be said that the murders were sporadic and unproved, whereas the retribution was flagrant, utterly lawless and ruthless, and probably fell upon many innocent persons. On these questions Mr. Alldridge,[1] whose book is a mine of information on fetish, has nothing to say, because when he wrote in 1901 he believed that the Proclamation of 1892 and the Ordinance of 1895 were both successful, and that neither the Tongo players nor the Human Leopards any longer existed. The events of 1905–1912 must have rudely dissipated this belief: the Human Leopards at least were hardly scotched.

The Government of Sierra Leone are under no misapprehensions. In his dispatch on the work of the Special Commission the Governor, Sir E. Merewether, says that the activities of the Human Leopard Society may be checked, but it is imprudent to assert that it has been broken up.

> The blind belief of the natives in the efficacy of the medicines . . . the fact that periodical human sacrifices are considered to be necessary in order to renew the efficacy of those medicines; and a tendency on the part of some natives to cannibalism pure and simple—all these causes will contribute to the survival of this baneful organisation.

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[1] *The Sherbro and its Hinterland.* By T. J. Alldridge. (Macmillan & Co., 1901.)

THE CONSTITUTIONS OF INDIA AND CANADA.

[*Contributed by* PROFESSOR A. BERRIEDALE KEITH, D.C.L., D.LITT.]

IN the constitutional history of India the year 1915 will always be memorable for two facts each in its own way of the highest importance and interest. The Viceroy was authorised by the Imperial Government to inform his Legislative Council that their desire that at the next Imperial Conference India should be formally represented would receive the sympathetic consideration of His Majesty's Government, though the decision must rest with the Conference itself, and the Imperial Parliament passed an Act to consolidate the enactments relating to the government of India.[1] The first step was the logical outcome of the decision of the Imperial Government that it was right and proper to employ in the general defence of the Empire in the European area of war such forces as could be spared from India; the second was an indispensable preliminary to the process of evolution which the constitution of India must undergo to adapt it to the change of circumstances. Obvious considerations of expediency resulted in the work of revision being confined to consolidation merely, even when that process necessitated leaving on the statute book provisions such as that of s. 52 permitting the eventual constitution of the province of Agra into a presidency—a proposal now, as pointed out by Sir Courtenay Ilbert,[2] practically impossible of performance. The chief disadvantage of the Act in its new form is that here and there occur provisions easily intelligible when it is remembered that they date from the conditions of the end of the eighteenth century, but as standing in an Act of 1915 curiously archaic.[1]

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[1] 5 & 6 Geo. V. c. 61. See also *Government of India* (*Consolidation*) *Bill, Report, Proceedings and Minutes of Evidence*, House of Lords Paper 98 of 1915. The Act is based on the digest prepared by Sir Courtenay Ilbert in *The Government of India* (see JOURNAL, vol. XV. 257, 258). The slight differences between it and the Act are given in a supplement to that work, *Table of Comparison between Digest and the Act* (Oxford: Clarendon Press, 1916).

[2] Report of Committee, p. 16.

Similarity of Constitutions.—In essence, however, the constitution of India is modern, and it bears a far closer similarity to the constitutions of the self-governing Dominions than is commonly realised either in India or in these Dominions. This can be seen most easily from a comparison between the constitution of India as it stands in the Act and that of the Dominion of Canada. Not only is the Canadian constitution the model of self-government which is most often appealed to as representing the ideal to be aimed at in the government of India, but comparison is rendered more appropriate in this case than in that of Australia by reason of the fact that the relation of the central to the provincial governments of Canada is much closer than the relation of the Commonwealth and State governments, that the constitution of Canada is much more rigid than that of the Commonwealth, and that it provides less directly for the principle of responsible government. Moreover, the constitution of Canada has attained a degree of acceptance and permanence which cannot be predicted with safety of the constitution of the Commonwealth; even the Liberal-Conservative party desires to modify it, and it will be transformed radically if the proposals of the Labour party are ever carried into full effect. The Canadian constitution is also in closer harmony with the principles of the law of the United Kingdom, for its interpretation—of which an able study by the Hon. W. H. P. Clement, Judge of the Supreme Court of British Columbia, has just appeared in a third and much improved edition [2]—has been directed by the Judicial Committee of the Privy Council in strict accord with the spirit of English jurisprudence, while the interpretation of the constitution of the Commonwealth by the High Court of Australia has for good or bad been dominated by the jurisprudence of the United States of America.

Fundamental Difference.—Among the many differences between the constitutions of India and the Dominion there is but one which can be regarded as fundamental,—the fact that in practice the latter enjoys responsible government, while the former is subject to the control of the Secretary of State for India. The distinction is an important one, and it lies at the back of the exclusion of India from the Imperial Conference which it is the desire of the Government of India now to undo. Real, however, as it is, it is important not to exaggerate it nor to overestimate its importance. In the first place it is obvious that responsible government in itself cannot be regarded as necessary to the claim of a government to be democratic in the sense that it represents a free people: the government of the United States is not responsible to Congress, and the framers of the Australian constitution were content to contemplate the disappearance of responsible government in the English sense: even to-day a section at least of the Labour party in the Commonwealth demands the introduction of elective ministries,—a proposal which is expressly stated to be intended to destroy the ordinary plan of ministerial responsibility, declared to be unsuited to the circumstances of Australia. In the second place, if the test relied upon is representation of the will of the people, then it must be admitted that election is no more than one mode of securing that a government shall represent the popular will. Political theory has now abandoned, even if popular opinion clings fondly to, the view that there is any magic in the mere principle of voting, and Canada is at this moment face to face with a grave franchise problem. The principle that men only shall exercise the franchise has at last been invaded by the concession by Manitoba of the provincial suffrage to women, and the other provinces of the middle west are expected to follow suit. At present the federal franchise is regulated by the provincial,[1] and the alteration of the position in Manitoba has led to the decision of the government to consider the question of creating a new federal franchise, in connection with which, of course, the whole problem of female suffrage must be dealt with. The case of South Africa is even more obviously difficult: the great majority of the population of that country has no representation at all in the Union Parliament, and the government of the Union cannot be held to represent its views with any degree of accuracy. Nor, it must be remembered, in the Union is the suffrage extended even to every European British subject, though the qualifications for the franchise are not very exacting. The case of India, in fact, differs from that of the Union in degree, not in kind, and the distinction between the two has been considerably diminished by recent legislation.[1] The constitution of India now recognises election as one of the means of appointment of members of both the central and the local legislatures, and the principle is one which will doubtless be extended in the course of time. What, however, is really more important is that the whole aim of the British administration of India is to secure the carrying out of the best interests of the people of India, to give effect to the aspirations and desires of that people, and to further its material and intellectual progress. The civil service of India in the person of its senior officers is vitally concerned with the legislation of the country, and that service is even in the case of its higher ranks recruited by competitive examination to which British Indian subjects are admitted. The facts of colonial history are being repeated in the case of Indian history: the control of the Imperial Government is being steadily diminished in many matters (*e.g.* the Budget) formerly held to be of Imperial interest, and the Government of India is assuming more and more clearly a definite and separate personality of its own, which renders it less and less appropriate that it should be represented merely by a minister of the Imperial Government.

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[1] E.g. ss. 42, 45(2) *ad fin.*, 51.

[2] *The Law of the Canadian Constitution.* By the Hon. W. H. P. Clement. 3rd ed. (Toronto: The Carswell Co. Ltd. 1916; London: Sweet & Maxwell.)

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[1] *Revised Statutes*, 1906, c. 6, s. 10.

I. The Secretary of State in Council and Parliament

The formal control of the Executive Government of India which is given to the Secretary of State by s. 2 of the Act is anomalous and can be explained only by the historical fact that the sovereignty over India had in fact been exercised by the East India Company under the supervision of the Commissioners for the Affairs of India. This connection with a commercial company has led to a distinction which differentiates the position of the Secretary of State for India from that of the Secretary of State for the Colonies. In Canada and in the other Dominions the executive government is, as in India, vested in the Crown, but its execution is entrusted to the Governor-General or Governor, not to the Secretary of State, who owes his actual authority solely to the fact that the

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[1] 9 Ed. VII. c. 4; 2 & 3 Geo. V. c. 6.

Crown acts on his advice; in India, on the contrary, there is a duplication of authority: the superintendence, direction, and control of the civil and military government of India is vested in the Governor-General in Council,[1] but he is required to pay due obedience to all such orders as he may receive from the Secretary of State, and the Secretary of State may superintend, direct, and control all operations and concerns which relate to the government of India and to its revenues.[2] The imposition of such an obligation on the Secretary of State necessarily involves the giving to him of aid in his duties, and the Council of India serves this purpose.[3] The appointment of its members rests with the Secretary of State, but once appointed they hold office for seven years, and unless they resign can only be removed by the Crown on an address from both Houses of Parliament. Their number must not be less than ten nor more than fourteen; at least nine must have served or resided in British India for at least ten years, and not left India more than five years before the date of their appointment; for special reasons of public advantage a member may be reappointed for five years; no member of the Council may be a member of Parliament. The Council has the important duty of conducting the business transacted in the United Kingdom in relation to the government of India, but it acts under the direction of the Secretary of State, by whom every order or communication sent to India and every order made in the United Kingdom under the Act must be signed. The quorum is five, the Secretary of State is President with the power to vote, and the Council must meet at least once a week. Provision is made for the creation of Committees of Council by the Secretary of State, and the assignment to these Committees of definite spheres of business.

Control of the Secretary of State.—Important, however, as the functions of the Council, and still more of its Committees, are, their authority is, save in very few matters, strictly subordinate to that of the Secretary of State.[4] Save in these cases, if the Secretary of State presides at a Council meeting, his view must be accepted; if a Council decides in his absence, his approval in writing is required. Normally indeed every order or communication to India or order to be made in the United Kingdom must either be submitted to a Council or placed in the Council room for the perusal of the members for seven days before its despatch or making, but even if a majority of the Council records dissent the Secretary of State may take the proposed action, though he must record his reasons for doing so. He may also act without the Council in cases which he deems urgent, though he must record his reasons and inform the Council. But in cases of levying war or making peace, or negotiations with or questions of policy as to any prince or state, he may, if he consider fit, send his orders to any officer in India without the knowledge of the Council, and the Governor-General in Council and Governors in Council may mark such correspondence emanating from them as secret, in which case it need not be shown to the Council of India at all. In point of fact the requirement of submission to the Council is obviously one which in minor matters would involve undue delay, and in practice a somewhat curious system of supplementary correspondence has grown up by which some of the inconveniences of the strict letter of the law are mitigated.

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[1] 5 & 6 Geo. V. c. 61, s. 33. [2] S. 2. [3] Ss. 3–10. [4] Ss. 11–16.

Powers of the Council of the Secretary of State.—The powers of the Council which the Secretary of State cannot override are in the main connected, for historical reasons, with finance, representing the distinction between the commercial rights of the East India Company and its political authority in much the same way as there exists a distinction at present between the political authority entrusted to the British South Africa Company and its commercial privileges. No grant or appropriation of the revenues of India or of the property transferred under the Act of 1858 to the Secretary of State can be made without the assent of a majority of the Council,[1] and the powers of the Secretary of State to sell, mortgage, and buy property, and to enter into contracts, is subject to the same consent.[2] The consent of a majority of the Council is also required for the sanction of any rules which may be made by the Governor-General in Council for regulating the appointment to the Indian Civil Service of persons domiciled in British India and born of parents habitually resident there, and for the approval of the appointment to posts reserved by the Act for members of the Indian Civil Service of persons not members of that service.[3] Of these powers by far the most important is the control of expenditure. In regard to the revenue and the expenditure of India a curious position exists: in the Crown Colonies the control of the expenditure is one of the chief duties of the Secretary of State for the Colonies, but the legal appropriation rests with the local legislature no less than in the self-governing Dominions, which, financially, are independent of any control by the Imperial Government. In the case of India the Act itself charges on the revenues all expenses, debts, and liabilities lawfully contracted and incurred on account of the government of India and throws upon the Secretary of State in Council the control of the expenditure both in British India and elsewhere.[1] It follows from this position of the Secretary of State that power to deal with property situated in India or make contracts can only be exercised by the Governor-General in Council or any local government subject to restrictions prescribed by the Secretary of State with the approval of a majority of the Council.[2] It follows also that from his control of the assets and revenues of India the Secretary of State is deeply concerned in financial business,[3] and a further consequence is that the Secretary of State in Council is a legal entity with powers to sue and be sued[4]: any person has the same remedies against the Secretary of State in Council as against the East India Company, but he and the members of his Council and officers acting on his behalf are exempt from personal liability, though the revenues of India remain liable, and execution may be had against property vested in the Crown. The Government of India in this regard is in an inferior position to a Dominion Government, which, primarily, is not liable at all to suit, though in most cases in the Dominions that exemption has been greatly limited by legislation. On the other hand it is contrary to practice in the Dominions to allow execution against governmental property in any case. But of course the power to bring actions does not extend to cases where the measures taken by the government are political in nature, in which event even the East India Company would have been held to be exempt from suit.

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[1] S. 21.

[2] Ss. 28, 29.

[3] Ss. 99, 100.

Sovereign Authority.—As the commercial side of the East India Company is reflected in the commercial provisions of the Act, its exercise of sovereign authority is continued in the clauses regarding the carrying on of war and the making of peace and of political treaties. While Parliament has claimed some measure of control over the power to carry on war in India, it has not forbidden the exercise of that power. An order directing the actual commencement of hostilities must be communicated to Parliament within three months after it has been given,[1]—the time allowed being a quaint relic of the past. Except for the purpose of preventing or repelling actual invasion or under other sudden and urgent necessity, the revenues of India shall not, without the consent of both Houses of Parliament, be applicable to defraying the expenses of military operations carried on beyond the external frontiers of His Majesty's Indian possessions by His Majesty's forces charged upon those revenues.[2] But even the Governor-General in Council has certain powers of levying war without the previous approval of the Secretary of State in Council.[3] If hostilities have actually been begun or preparations made for beginning hostilities against British India or a dependent prince or state, or a prince or state protected by treaty of guarantee, he may declare war, commence hostilities, or make treaties for making war against the attacking power, and may even make treaties of guarantee in respect of the possessions of a prince or state in return for assistance against the assailing power. In any case where he commences hostilities or makes a treaty, the action must be reported to the Secretary of State. Even local governments may commence hostilities and make treaties in case of sudden emergency or imminent danger, but such treaties should, if possible, be made subject to ratification by the Governor-General in Council.[4] *De facto*, of course, the time for serious exercise of these powers has disappeared, and there has disappeared also the possibility of their exercise by the Secretary of State without the approval, in any case of importance, of Parliament. But the existence of the power is interesting: no Governor-General or Government of a Dominion has any legal authority to do a single act of sovereignty as regards the declaration of war, the making of peace, or of political treaties of any kind.

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[1] Ss. 20, 21, 23–6.

[2] S. 30.

[3] See *Parl. Pap.* Cd. 7236 and 7238.

[4] S. 32.

Parliamentary Control.—In addition to its control over the making of war by the Government of India and its exercise of the treaty power, Parliament is entitled to receive full account of the revenues and expenditure of India, together with an annual report on its moral and material progress,[1] while the home accounts of the Indian Government are audited by an independent auditor appointed by the Crown, who reports to Parliament.[2] The Act further declares[3] the power of Parliament to control the proceedings of the Governor-General in Council, to repeal or alter any laws made by any authority in British India, and to legislate for British India. But as in the case of Canada and the other self-governing Dominions this power is in abeyance, and is evoked into life merely when there is question of constitutional legislation or of general legislation for the Empire, in both of which cases Parliament is prepared to legislate even for the Dominions. In the Merchant Shipping (Convention) Act, 1914, and in the British Ships (Transfer Restriction) Act, 1915, alike British India appears with the Dominions as exempted from the operation of these Acts in favour of local legislation. The control of the government of India is left therefore in the hands of the Secretary of State, and he is naturally much influenced by the views of his Council, of whom two members are now normally natives of India. Moreover, recently the older practice by which the more important offices in the establishment of the Secretary of State were entrusted to officers who had served with distinction in India has been revived, and these two factors are powerful instruments in the process of securing the government of India in accordance with the views of the people of India.

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[1] S. 15.

[2] S. 22.

[3] S. 44.

[4] S. 45.

II. The Executive Government in India

In India itself the executive government is carried on, under the supreme control of the Governor-General in Council, by the Governors of Bengal, Madras, and Bombay with Executive Councils, the Lieutenant-Governors of Bihar and Orissa, the United Provinces of Agra and Oudh, the Punjab, and Burma with or without Executive Councils, and the Chief Commissioners of Assam, the Central Provinces, the North-West Frontier Province, British Baluchistan, Delhi, Ajmer-Merwara, Coorg, and the Andaman and Nicobar Islands, who have no Executive Councils.[4] New provinces may be created under Lieutenant-Governors by the Governor-General in

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[1] S. 26.
[2] S. 27.
[3] S. 131(2).
[4] Ss. 33, 45, 46, 53 and 58.

Council with the previous sanction of the Crown,[1] and an Executive Council may be created for any province with the consent of the Secretary of State in Council,[2] but subject to the approval of both Houses of Parliament,—an approval which in one case already has been withheld by the House of Lords. The Governor-General and Governors and the members of their Councils are appointed by warrant under the Royal Sign Manual; Lieutenant-Governors and the members of their Councils by the Governor-General with the approval of the Crown.[3] The Council of the Governor-General may not exceed six in number unless the Commander-in-Chief in India is appointed a member by the Secretary of State in Council: three at least must have held office in India for not less than ten years, while one must have legal qualifications. The Governors' Councils may not exceed four, two of whom must have had twelve years' service in India, but the Commander-in-Chief, if resident at Calcutta, Madras, or Bombay, shall, while resident, be a member. A Lieutenant-Governor's Council may not exceed four.[4] As in the case of the Secretary of State's Council, it is now the practice to have one member of each Executive Council if possible a native of India. In the Executive Councils the decision is normally by the majority of votes, the Governor-General or other presiding officer having a casting vote, but the Governor-General or Governor or Lieutenant-Governor is authorised to overrule the Council if he considers that the matter essentially affects the safety, tranquillity, or interests of the territory over which he is in charge.[5] The system of appointments is unsymmetrical as compared with Canada, where the Lieutenant-Governors are simply the nominees of the Governor-General in Council and where there is no officer corresponding to the Governors, while it differs from Australia, in which the Governors of the States are appointed by the Crown, by reason of the fact that the Governors of Indian provinces are, unlike their Australian *confrères*, under the control of the Governor-General, though like them they correspond direct with the Secretary of State and not, like Lieutenant-Governors, only with the Governor-General.[6] In Canada, however, the theoretic control of the

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[1] S. 53(2).
[2] S. 55.
[3] Ss. 34, 36(1), 54(1), and 55(3).
[4] Ss. 36, 37, 47, and 55(1).
[5] Ss. 41 and 50.
[6] But it must be remarked that a local Governor is required to report fully on all matters to the Governor-General by s. 45, so that the right of direct correspondence is really an historical curiosity rather than a logical procedure.

Lieutenant-Governor by the Governor-General in Council is not in fact seriously exercised, as it would be hardly consistent with the principles of responsible government, though it was only by degrees that this position was accepted by Sir John Macdonald: in India, on the other hand, all local governments are subjected to a measure of supervision by the central Government which has resulted in a decentralisation movement to counteract its effect. The Executive Councils of the Governor-General and Lieutenant-Governors in Canada consist of course of responsible ministers, but while the Governor-General has in fact normally—not always—acted on the advice of his Council, the Lieutenant-Governors have even up to the latest period[1] exhibited their willingness to control if necessary their ministries, and this position has been accepted by Canadian public opinion when confined within due limits.

III. Indian Legislation

As in Canada, legislative authority in India is vested in the hands of several bodies, but the Indian legislatures differ from the Canadian both in respect of composition and powers. In Canada the federal legislature and those of Quebec and Nova Scotia are bicameral, with upper chambers of limited numbers of nominees, and elective lower houses: in all the other provinces there are elective single chambers. In India all the legislatures are of one house: in every case they include the members of the Executive Council, if any, and the head of the administration and a number of other members nominated or elected according to rules made by the Governor-General in Council with the approval of the Secretary of State in Council, and such rules must be laid before both Houses of Parliament and may not be changed by the Governor-General in Legislative Council.[2] The principle is, however, laid down that the nominated and elected members must to the extent of one-half at least in the case of the Governor-General's Council and those of the Governors, and of a third in other cases, be persons not holding civil or military office under the Crown in India, and the seat of an additional member who accepts such office shall *ipso facto* be vacated.[3] Moreover, the maximum numbers of such additional members are fixed at sixty in the case of the Indian Legislative Council, fifty in the case of Bengal, Madras, Bombay, Bihar and Orissa, and the United Provinces, and thirty in every other case present or future. On the establishment of a new Lieutenant-Governorship, a Legislative Council may be set up by the Governor-General in Council with the previous sanction of the Crown, and the Governor-General in Council is authorised to apply the provisions of the Act relative to Legislative Councils to any province under a Chief Commissioner,[1]—a power which may be compared with that of the Parliament of Canada to create new provinces out of Canada.

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[1] *E.g.* the enforced resignation of the Manitoba Government in 1915.

[2] Ss. 63, 74 and 76.

[3] Ss. 63(3), 74(2), and 76(2).

Limitations upon Legislative Councils.—In the case of both the Indian Legislative Council and the local legislatures there are definite limitations, foreign to the Canadian system, on the activity of members. The proper business of the Councils is the consideration of motions having regard to legislative proposals, of the proposals themselves, and of rules of procedure.[2] Even, however, in this sphere there are further restrictions: thus the previous sanction of the Governor-General in the Indian Legislative Council is requisite before any measure can be introduced affecting the revenue or debt of India, and for this, of course, there is analogy in the Canadian constitution:[3] but the same permission is required in the case of measures affecting religion, the discipline or maintenance of His Majesty's forces, military or naval, and the relations of the government with foreign princes or states, and all these and some additional restrictions apply to the local legislatures. In all cases, however, provision is made by rules which are unalterable by the Indian Legislative Council or the local legislatures, under which the annual financial statement may be discussed, matters of general interest considered and questions asked, and by these rules much of the ordinary authority of a legislature is, in fact, conferred on the Indian legislative bodies.

Powers of the Governor-General in Legislative Council.—The powers[4] of the Governor-General in Legislative Council are actually more extensive than those of the Federal Parliament of Canada or any Dominion Parliament. They cover not only the power to make laws for all persons, Courts, places, and things within British India, which are the powers of a Dominion Parliament in a unitary

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[1] S. 77. [2] Ss. 67 and 80. [3] 30 & 31 Vict. c. 3, s. 54. [4] S. 65.

Dominion, and which are, of course, much in excess of the powers of any federal Parliament, but they include authority with regard to all British subjects and servants of the Crown in other parts of India, and all native Indian subjects of His Majesty within and beyond as well as within British India, the regulation of His Majesty's Indian forces, wherever serving, in so far as they are not subject to the Army Act—a power conferred by the Imperial Army Act also on colonial legislatures—the government of persons in the Royal Indian Marine Service within the limits of Indian waters, defined [1] as the high seas between the Cape of Good Hope on the west and the Straits of Magellan on the east—a power only conceded in 1911 [2] to Dominion Parliaments as regards Dominion naval forces—and, most remarkable of all, a power to repeal any Act of the Imperial Parliament passed prior to 1861, except any Act enabling the Secretary of State in Council to raise money in the United Kingdom. To Acts of Parliament after 1860 the doctrine of repeal does not apply, and the Council may not pass a law affecting the authority of Parliament or any part of the unwritten law or constitution of the United Kingdom dealing with allegiance, or the sovereignty or dominion of the Crown over any part of British India. All these restrictions, however, apply equally to any Dominion Parliament, and the only specific restraint on the Council peculiar to itself is that it may not, without the previous approval of the Secretary of State in Council, empower any but a High Court to sentence to death a European British subject or the child of such a subject, or abolish a High Court.[3] The wide power of legislation for native Indian subjects might, it is clear, if used unwisely, raise difficult problems of law; thus it might be held that legislation under this power as authorised by Parliament would be paramount to legislation enacted by any colony whose constitution rested merely on the prerogative.

Relation of Central to Local Legislatures.—The relation of the central to the local legislatures is peculiarly simple. No effort is made, as in Canada [4] and Australia,[5] to mark out national from provincial spheres of action, while from South Africa [6] India differs in that, while the central legislature is not in any way fettered in its authority, the local legislature is far less restricted in its activity than the Provincial Councils of South Africa. A local legislature has a general power to legislate for the peace and good government of the province[1]: the only absolute disability under which it labours is that it may not affect any Act of Parliament, and that it requires the previous sanction of the Governor-General before it can repeal any law made by any other authority than itself, or make any law affecting the public debt or customs duties or other tax imposed by the Governor-General in Council, coinage or currency, the conveyance of letters and telegraphy, the Indian Penal Code, religion, the military and naval forces, patents and copyright, or the relations of the government with foreign princes or states. Nonetheless, if such a law is actually passed and assented to, it is not invalid, so that the local legislatures may actually repeal or vary Acts of the central legislature with the agreement even *ex post facto* of the Governor-General. One restriction on their power is possibly to be inferred from s. 84 of the Act, which in the case of the Indian Legislative Council expressly declares that no objection can be taken to the validity of its enactments because they affect the royal prerogative, but it would probably be unfair to press the meaning of this enactment so far. In regard to all the Councils, however, it is expressly provided that the fact that the number of non-official members was not complete when an Act was passed shall not affect its validity, a provision which recalls cases where colonial legislation has been asserted to be invalid on such a ground.

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[1] S. 66(1).

[2] 1 & 2 Geo. V. c. 47.

[3] S. 65(3).

[4] 30 & 31 Vict. c. 3, ss. 91-5.

[5] 63 & 64 Vict. c. 12, s. 51.

[6] 9 Ed. VII. c. 9, ss. 85-7.

Royal Assent.—As in Canada, the Governor-General may refuse his assent to any law of the central legislature, or reserve it or assent: in the case of reservation the Crown may assent: in the case of assent it may disallow,[2] but no periods are fixed, contrary to the Canadian rule.[3] The Governor, Lieutenant-Governor, or Chief Commissioner cannot reserve as can a Canadian Lieutenant-Governor, though the practice is rare; he can refuse assent or assent, but in the latter case the Act does not come into force until it is assented to by the Governor-General, and even if he assents the Act may be disallowed by the Crown.[4] In Canada an Act assented to becomes operative and may only be disallowed by the Governor-General in Council. Both in Canada and India, however, disallowance of provincial Acts is not common, and still less so of course is the withholding of assent to Acts of the central legislature. Peculiar to India is the power of the Governor-General to make temporary Ordinances in cases of emergency, and of the Governor-General in Council to make regulations with the force of law on the request of a local government.[1]

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[1] S. 79.

[2] Ss. 68 and 69.

[3] 30 & 31 Vict. c. 3, ss. 55–7.

[4] Ss. 81 and 82.

Alteration of the Constitution.—Wide as are the powers of the legislatures they have little power of constitutional alteration. The local legislatures indeed have absolutely no such power; their constitution and the limits of their authority are determined by enactments or rules which they cannot change, and in this respect they differ from the Canadian provincial legislatures which cannot indeed alter their sphere of action, but can freely alter the constitution of the legislature and of the executive[2] save as regards the position of Lieutenant-Governor. The Dominion Parliament, however, is much more restricted, the form of the legislature being closely defined as a result of the federal pact necessitating not rare recourse to the Imperial Parliament, as in 1907 and 1915. The Indian Legislative Council is in much the same position, but through the curious and apparently somewhat inadvertent[3] grant of the power to alter any Act of Parliament prior to 1861 it has some odd powers:[4] it could repeal the provisions requiring obedience to the orders of the Secretary of State, the limitations on the power of the Governor-General in Council or local governments to make war or treaties, the provisions regarding the jurisdiction, powers, and authorities of the High Courts, the rules of law to be followed by these Courts in native cases, and many other judicial provisions, including even rules as to prosecution of offences in the United Kingdom. In Canada also, owing to the terms of the Act of 1867, judicial matters can freely be dealt with by the Federal or Provincial Governments.

IV. The Judiciary

Appointments to the High Courts of India rest not as in Canada with the Governor-General in Council, but with the Crown, and judges hold office only at the pleasure of the Crown,[1] though in accordance with the constitutional rule *de facto* their tenure is as secure as in Canada, where they may be removed by the Governor-General on a Parliamentary address. New High Courts may be established by the Crown under Letters Patent, and the jurisdiction of existing High Courts may then be altered,[2] and subject to disallowance by the Crown the Governor-General in Council may alter the local limits of the jurisdiction of any High Court and authorise it to exercise its jurisdiction in respect of Christian subjects of the Crown resident in India outside British India.[3] The High Courts possess wide and ample original and appellate jurisdiction, including Admiralty jurisdiction, but certain limitations due to historical considerations are imposed. They are denied original jurisdiction in revenue matters,[4] and the High Courts at Calcutta, Madras, and Bombay are expressly required in the exercise of their original jurisdiction in cases of inheritance and succession, and contract and dealing between parties, to follow the personal law of the two parties if they are both under the same law, and if not, that of the defendant,[5] a principle which, of course, is followed generally in the Indian High Courts. But in respect of their official actions only the Governor-General and the Governors and the members of their Executive Councils are exempt from their jurisdiction, criminal or civil, save in the former case in respect of treason or felony.[6] Moreover,[7] in any proceeding, civil or criminal, the order in writing of the Governor-General in Council shall be a full justification of the act in question, except so far as the order extends to any European British subject, but proceedings may be taken against the Governor-General, or any member of the Council or person acting under the order, in England. As acts done outside the United Kingdom are not normally justiciable in it, express provision is made for the trial before the High Court in England of any official guilty of oppression, of disobedience to the orders of the Secretary of State, of breach of duty, of trading, or receiving presents save as expressly permitted, all of which offences are made misdemeanours punishable by fine or imprisonment or both.[8] Somewhat similar provisions exist as regards the actions of

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[1] Ss. 72 and 71.

[2] 30 & 31 Vict. c. 3, s. 92(1).

[3] Sir Courtenay Ilbert, *Report*, p. 20.

[4] See Sched. V.

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[1] S. 102(1).

[2] S. 113.

[3] S. 109.

[4] S. 106(2).

[5] S. 112.

[6] S. 110.

[7] S. 111.

[8] Ss. 127 and 129.

Governors in their colonies,[1] but there is the essential distinction that a Governor enjoys no exemption in any case whatever from the jurisdiction of the colonial Courts, and the order of the Governor is no excuse for any action, unless, of course, it can be shown that the act ordered was legal. With the advance of responsible government the rule of liability to proceedings, criminal or civil, has become illogical, since in effect the responsibility for official action ought to be accepted by the ministers by whom the action is really taken.

V. Ecclesiastical Establishment

One more contrast between the two constitutions may in conclusion be noted. In Canada, before the bringing about of federation, the Imperial Government had definitely announced its decision to abandon the practice of creating bishoprics by Letters Patent, and the Church of England in the Dominion owes its legal position to local legislation in the provinces. In India, as in England, the Church is formally recognised in the constitution: the Bishops of Calcutta, Madras, and Bombay are authorised to exercise within their dioceses such episcopal functions and such ecclesiastical jurisdiction for the superintendence and good government of the ministers of the Church of England therein as may be directed by Letters Patent,[2] and salaries are provided for these officers, of whom the Bishop of Calcutta is Metropolitan, subject to the general superintendence and revision of the Archbishop of Canterbury.[3] Provision is made also for chaplains of the Church of Scotland,[4] and the Governor-General in Council with the sanction of the Secretary of State in Council may make grants to other religious Christian bodies for purposes of education or the maintenance of places of worship.[5] In Canada, of course, the law of Quebec makes the church almost an integral part of the State, and exacts tithes from all Roman Catholics for the support of the Church, and in the other provinces occasional grants of various kinds to ecclesiastical bodies occur.

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[1] 11 & 12 Will. III. c. 12; 42 Geo. III. c. 85.

[2] S. 115.

[3] Ss. 118–21 and 116.

[4] S. 122.

[5] S. 123.

VI. The Interpretation of the Constitution

The essential simplicity of the Indian constitution as it stands at present has naturally resulted in few constitutional cases of importance being brought before the Courts ever since in *R.* v. *Burah*[1] the sovereign authority of the legislation of a Legislative Council within the ambit of its authority was laid down by the Privy Council. In this regard it stands in the most striking contrast to the Dominion, the complications of whose legal history are at once a grave warning to those who would wish to see the constitution of India developed on a federal basis, and a delight to the legal intellect. In its new form Mr. Clement's work serves admirably to indicate the many complicated problems arising out of the relation of Canada to the United Kingdom, and of the federal to the provincial legislative authorities. The possibility of so devising a federal system that conflicts of jurisdiction would be few is clearly a vain hope. Even since Mr. Clement's book was written the Judicial Committee has laid down a doctrine of the highest importance as to the power of provincial legislatures to establish corporations. It has reversed the decision of the Supreme Court of Canada in the *Bonanza Creek Gold Mining Company's* case[2] and has decided that a company incorporated by provincial Letters Patent issued in conformity with provincial legislation under s. 92 of the British North America Act, 1867, has, unless forbidden to do so by its charter of incorporation, power to acquire and exercise rights outside the province. Their lordships have also, in this instance, in agreement with the Supreme Court, laid it down that neither under the trade and commerce power nor under the residuary power can the provision of s. 4 of the Insurance Act, 1910, of Canada be justified in so far as it attempts to provide that no company in Canada can carry on insurance business without a Dominion licence, and that an insurance company incorporated by a province can not only carry on business therein, but can also carry on business in other provinces if the laws of these provinces permit it to do so, while on the other hand, as decided in the *John Deere Plow Company's* case,[3] the Dominion can confer capacity to transact insurance business throughout Canada by incorporation, and further, under its trade and commerce power and its power as to aliens, could require a foreign company to take out a licence even when its business is restricted to one province.

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[1] 3 App. Cas. 889.

[2] 50 S.C.R. 534.

[3] [1915] A.C. 330.

The question of the local limitation of Dominion legislation is dealt with by Mr. Clement in a very interesting manner,[1] but, as in the case of his treatment (pp. 220–2) of merchant shipping, with inadequate knowledge of the literature, and with insufficient care to distinguish the different aspects of the problem. Thus the decision in *Phillips* v. *Eyre*[2] is quoted as an instance in which an English Court accepted the ex-territorial effect of a Jamaica Indemnity Act, whereas it merely illustrates the principle of English law[3] that an action in England based on tort will only lie in respect of things done abroad if they are tortious both by English law and by the law of the foreign country, and in *Eyre's* case the acts had been declared by local Act not to be tortious. *Macleod's* case,[4] in fact, disposes of the matter, and its authority and binding character are not affected in the least by the failure of the Supreme Court of Canada to observe its provisions in exercising its bigamy jurisdiction.[5] In the High Court of the Commonwealth the principle has been repeatedly recognised; it is another question whether it might not properly be relaxed; in the case of India as mentioned above it is much less strictly imposed, and in Australia its rigour is mitigated by s. 5 of the Constitution Act. Moreover, in the case of naval forces a mode of evading it has been provided by the Naval Discipline (Dominion Naval Forces) Act, 1911, the full force of which Mr. Clement hardly appreciates. Nor is his accusation (p. 249) of the authors of the *Revised Statutes of Canada*, 1906, as guilty of error in the wording of s. 951 of the Act (c. 113) regarding merchant shipping justified: the section is strictly correct as a consolidation of the Act c. 40 of 1891, and it may be added that the part of the Act concerned has never come into operation at all. The error in neglecting to carry out the forms prescribed by the Merchant Shipping Act, 1894, which has led to confusion in Canadian merchant shipping must be attributed not to the consolidaters but to the earlier legislators.

Mr. Clement's interesting discussion[6] of the appeal to the

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[1] Chap. VII.

[2] 6 Q.B. 1, at p. 20.

[3] *Carr* v. *Fracis Times & Co.*, [1902] A.C. 196.

[4] [1891] A.C. 455.

[5] *Re Bigamy Sections*, 27 S.C.R. 461.

[6] Pp. 158 *et seq*

Judicial Committee suffers like other discussions by the omission to note that by the terms of the Act 7 & 8 Vict. c. 69, save when taken away by subsequent legislation by Parliament itself, the power of the Judicial Committee to hear appeals at its discretion is definitely established and cannot be varied by any local legislation, so that the famous Canadian Act shutting off appeals in criminal cases from the Supreme Court is legally waste paper. Nor is it wise to cite[1] the dictum of the Privy Council[2] that, after a colony has received legislative institutions, the Crown as regards power of legislation stands to that colony as it does to the United Kingdom, without pointing out that the phrase "legislative institutions" must be confined to elective legislative institutions, which was the real decision in *Campbell* v. *Hall*,[3] and which has been the principle acted on for a century. Nor again is it strictly accurate to use the phrase Crown in Council, in the same way as Governor in Council is used in Canada, for the Executive Government of the United Kingdom; thus the appointment of a Governor is not made by the Crown in Council either formally or in fact: formally it is conferred by a commission under the sign manual countersigned by the Secretary of State for the Colonies: in fact, it is made on his advice and responsibility; there is no order in Council or Cabinet consent. Nor is it possible to accept Mr. Clement's effort[4] to solve the certainly very obscure problem of the meaning of the Privy Council judgment in the *Alberta Railway* case[5]: according to his view the Privy Council merely decided that the fund which the Alberta Court ordered to be paid out to the Provincial Treasurer was not effectively deposited in the Province of Alberta, and therefore could not be dealt with by the provincial legislature. This is clearly incompatible with the words of the judgment which ignore the question of the place where the money might be, and deal solely with the fact that the right of the bondholders to the return of their money was a right enforceable outside the province which the local legislature could not affect.[6]

Finally it may be regretted that Mr. Clement should still[7] maintain his feud with Professor Dicey regarding the similarity of the constitution[1] of Canada to that of the United States. Professor Dicey long ago made the necessary modification of the emphasis which he laid on the similarity of the legislative side of the Canadian federation to the form of government in the United States. No lawyer has shown in truth a more adequate understanding of the true position of colonial legislatures, and no one who has troubled to study the records of the treatment of provincial Acts by the Dominion Government during the first period of Sir John Macdonald's political career will doubt for a moment that in his view the power of disallowance of provincial Acts was intended to be exercised not merely as now on grounds of expediency, but as a means of preventing the provinces from exceeding the constitutional powers which in his opinion the British North America assigned to them, and how narrow was his conception of these powers students of his controversies with Sir O. Mowat well know.[2]

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[1] P. 17.

[2] *Re Lord Bishop of Natal*, 3 Moo. P.C. (N.S.) 115, at p. 148.

[3] Cowp. 204.

[4] Pp. 826, 827.

[5] [1913] A.C. 283.

[6] See above, pp. 90, 91.

[7] Pp. 152 *et seq.*

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[1] *Law of the Constitution*, 3rd ed. p. 156, n. 1.

[2] Students of the Constitution should perhaps be warned that the Letters Patent and Royal Instructions of 1878 printed at pp. 958–65 are not now in force and that their interest is only historical. Mr. Clement's treatment of the position of the Governor-General (pp. 362–4, 837–43) reveals an incomplete appreciation of the authorities, and cannot be accepted as valid.

THE CONSOLIDATION OF THE STATUTE LAW OF VICTORIA.

[*Contributed by the* HON. DONALD MACKINNON, M.L.A., *late Attorney-General for Victoria.*[1]]

The First Consolidation.—For many years the State of Victoria has periodically consolidated its statute law. So far back as 1863 the then Attorney-General, afterwards Higinbotham C.J., undertook to reduce the legislation applicable to the State to some sort of order. He was assisted by several barristers, including the late Dr. Hearn, the well-known constitutional authority, and a number of consolidating bills were passed in 1864 and 1865. As was the case in most of the Australian settlements, the statute law of Victoria in those days was quite chaotic. It was composed in part of the enactments of the recently created Victorian Legislature, partly of laws which came from the mother state of New South Wales, and largely also of Imperial measures which had force in the Colony by virtue of 9 Geo. IV. c. 83 or otherwise. On such an important practical topic as criminal law it was confidently asserted that only two lawyers—one of them the late Sir Robert Molesworth—possessed any reliable acquaintance with its statutory provisions. The value to a pioneering community which consisted largely of mining camps and townships and scattered pastoral settlements of a clear and orderly presentation of its statute law can hardly, if we consider the administrative and judicial requirements, be overestimated. The difficulties of this first consolidation lay in the diversified and conflicting nature of the legislative material, into which it introduced some sort of order, and its merit, apart from the accuracy of the actual drafting, is found in the fact that it formed a solid foundation for the legislation of an expanding community and a basis for future consolidations such as those of 1890 and 1915.

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[1] Mr. Mackinnon was one of the draftsmen engaged under the direction of Chief Justice Higinbotham in the consolidation of 1890, and was Attorney-General in the Ministry which was in office when the consolidation of 1915 was carried through.—EDS.

The Consolidation of 1890.—The second consolidation took place in 1890. It was the result of a suggestion made in the annual report of the Supreme Court judges and was carried out by Mr. Higinbotham, now Chief Justice. During the interval of a quarter of a century since the first consolidation—a period of considerable legislative energy—the statute law had become bulky and unwieldy. In the judges' report of 1887 it was stated that—

> many new amending Acts of Parliament have been passed and a considerable number of reported decisions upon repealed and also unrepealed Acts have ceased to be applicable to the present state of the law and serve to mislead, rather than to assist, judges and legal practitioners.

The design on this occasion was one of simplification by re-arrangement, the elimination of obsolete provisions, and the removal of obvious inaccuracies and inconsistencies. It was a less venturesome undertaking than either its predecessor or its successor; not much re-drafting was attempted, and where it was felt that Parliament might have one of two views where interpretation was doubtful the doubt was consolidated rather than solved. It was perhaps more a laborious than an ambitious work, but the lapse of years amply demonstrates the care and accuracy with which it was performed; it was a necessary stage in the improvement of the statutes. The Chief Justice died shortly after Parliament accepted his bills. He had an orderly mind; as a former representative of the people in a democratic age and community, he was repelled by a condition of the law which left it not easily understanded of the people; and it is to his zeal and initiative that the satisfactory state of the Victorian statutes to-day is largely due.

The Consolidation of 1915.—The consolidation of 1915 passed by Parliament in the last session has been a larger affair than either of its predecessors. Not only had twenty-five years elapsed, but they were years of intense legislative activity. On this occasion responsibility again rested with one of the Supreme Court judges, Mr. Justice Cussen, who for some seven years gave the spare moments of a busy judicial life to his self-imposed task; his Honour was assisted by several members of the Victorian Bar. The Federal

Constitution and Federal legislation brought a new element into the consolidation which necessitated the exercise, if not of judicial determination, at least of judicial discrimination. The Post Office, customs and excise, and naturalisation being transferred to and legislated upon by the National Parliament, the draftsman had in these and other cases to decide whether State or Federal enactment prevailed, and to what extent State law and State capacity to legislate still survived. The Government also asked for a bolder consolidation than that of 1890. More was to be done in the way of removing anomalies, getting rid of obscurities, and filling up gaps. These instructions were accepted in the spirit in which they were given, and while the learned judge was able to assure a joint Parliamentary Committee that no alterations of substance had been made it was also plain that, apart altogether from verbal alterations and changes in form, several desirable amendments had been introduced. From the practical point of view, the measure of modification in consolidation is fixed by those limitations which Parliament insists upon. The Victorian experience in this respect is probably of interest outside the State of Victoria. So long as improvement by means of consolidation is entertained by Parliaments the experience of one country is reliable elsewhere. It is attempted here to indicate shortly the nature of the subordinate changes which were considered legitimate in consolidation.

The Influence of English Legislation.—Much Australian legislation is a direct copy of Imperial legislation. Australian measures reproduce English schemes and contrivances subject to such alterations and modifications as local circumstances may require. An Australian measure to meet some local condition provides for the attainment of its object by provisions on English lines; the Australian enactment re-enacts the English contemporary scheme. But in the course of twenty years the English way of dealing with similar conditions alters: practical experience has suggested something simpler and clearer. The colonial legislature adopts the later English version in legislating for the new circumstances. The consolidator when he finds different machinery applied to different but kindred conditions to effect the same object, assumes that Parliament approved of the more modern version and he makes it applicable all round. Again, with regard to procedure, when the English Judicature Act system was adopted in Victoria some thirty years ago, certain provisions of the earlier laws regarding legal proceedings were retained as more suitable to local circumstances. These still remained part of the statute law. In England the same object has been achieved by judge-made rules which are more clearly expressed and less costly in application, and in the circumstances the consolidator has not hesitated to substitute by enactment the English rules. Of the consolidation as a whole it may be stated that what may be called procedural matters were freely dealt with; "proprietory rights" were very tenderly handled, as it was thought more desirable to deal with the latter piece-meal. For example, a number of ancient sections in the Real Property Act which it is highly desirable should be got rid of or drastically altered in the near future were left alone lest necessary changes might imperil the passing of the bills. Another illustration of freedom in consolidation is provided by the treatment of Imperial enactments which were in force in Victoria. Imperial enactments in the true sense, *i.e.* Acts of the Imperial Parliament whether made specially for Victoria or extending to Victoria in common with other Dominions of the Crown, are of course untouched. But where English legislation enacted for England before the date of the introduction of English law into Australia is in force as part of the English law to be "applied" in Victoria, or, as is sometimes said, as part of the "common law" of the Colony—legislation over which, therefore, in its application to Victoria the local legislature has full control—the course that has been taken in the consolidation has been to treat the English statute as though it were a local statute, to repeal it and embody its terms in the consolidated statute dealing with the particular subject-matter to which it relates. A similar practice was followed in the consolidation of 1864–5. It is certainly an anomaly, for example, that those wishing to know the law with regard to limitation of actions should have to hunt up a statute of James I. To take another change effected in the process of consolidation. In some cases it was found that enactments of the Imperial Parliament which had been adopted locally have been replaced in England by fuller and better provisions. Instead of perpetuating legislation which has been discarded for something better in Great Britain, the latest English version is substituted. In this way the antiquated enactments known as Factors' Acts have given way to the latest English model.

Minor Modifications.—Reconciliation of anomalies and inconsistencies have been held to cover alteration of maximum and minimum terms of imprisonment and other penalties where the act of consolidation has brought hardly defensible variations into prominent contrast. The Crimes Act, which is really a criminal code, contains numerous instances of this sort of change. In cases where the statute has been amplified by well-recognised practice, the practice has been embodied in statutory form. Generally, the language of the Acts has been modernised throughout in accordance with the stricter and more accurate rules of later draftsmanship. The words "may" and "shall," for example, receive their proper value. Space will not allow of a full account of this important improvement in the laws of Victoria, but enough has been said to indicate the general design of the work and the spirit in which it has been carried through.

Parliamentary Procedure upon Consolidating Bills.—The bills, when completed and introduced into Parliament, were referred in successive sessions to a joint Committee of the two Houses for consideration and report. The first Committee reported that though they approved generally of the bills, they thought that some of the changes proposed were beyond what Parliament could adopt without a prolonged discussion. Modifications were accordingly made during recess to meet the views of the Committee, and the Committee in the last session being satisfied recommended Parliament to pass them into law and further advised that another consolidation should take place in five years. The learned judge was thanked by Parliament for the faithful discharge of his arduous task. The five volumes which now contain the statute law of the State are a fine testimony to the willingness of a democratic Parliament to accept their laws upon the guarantee of a respected judge as to their substantial accuracy. It may be added that there is in course of preparation a very complete index volume which will show in the case of each repealed statute what has become of its several sections in the process of consolidation.

THE CONSUL AS A FACTOR IN TRADE AND COMMERCE.

(WITH SPECIAL REFERENCE TO THE RUSSIAN CONSULAR SERVICE.)

[*Contributed by* BARON A. HEYKING, D.C.L.]

CONSULAR Officers are subordinate to the local Ambassador of their nationality. Only owing to the fact that it is not possible for the Ambassador to engage in all the details of the commercial interests of their country, can the Consul be rightly considered as being more particularly qualified to uphold commercial interests, for his endeavours are specially directed towards the possible extension of the trade of his country.

Commercial Agents.—The work of Consular Officers has been supplemented by Agents, who even more than Consular Officers are especially interested in upholding trade and commerce. Many great Powers—for instance Great Britain and Russia—have considered it advisable, owing to the growing importance of national trade and commerce, to appoint special Commercial Agents, in addition to their Consuls. These Agents are to the fullest possible extent specialists, as all their activity is devoted only to the trade and commerce of their country, while consular work is practically unlimited in its scope.

The Work of a Consul.—Besides safeguarding the commercial interests of his country, a Consular Officer must do the work of a notary public. He must act as a consulting jurist in every instance when he is requested to give information about the laws and Constitution of his country ; he must judge the differences which occur between captains and crews of vessels of Russian nationality, and must safeguard and regulate the interests of national shipping ; he must be the guardian of those of his countrymen abroad who are in need of his help ; he must be a statistician and must present

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to his Government reports not only of an economical nature, but on every subject upon which he is called to express himself. Knowing the local conditions of life, he must be the adviser of his countrymen in any untoward circumstances. He is also the administrator of different sums of money entrusted to his care. He is a registrar of births, marriages, and deaths, and in accordance with existing Consular treaties, has to draw up inventories, liquidate and administrate the estates left by those of his compatriots who happen to die in his district. Being engaged in charitable work, he must conduct minute inquiries regarding each applicant for charity, in order to find out if the case is deserving or not. He must take an active interest in Court proceedings in which his countrymen may be involved. To the best of his ability he must give information about his country to those making such inquiries. Much of his time must be spent upon the visé and issue of passports, and the Consul must be ready to attend to those who apply to him in his official capacity, as, for instance, ladies—who require a great deal of consideration—"inventors," adventurers, collectors of curios, and a species of crank who must be handled with a great amount of tact so as to avoid serious unpleasantness. He must be able to advise Russians with reference to their military duties. Finally, a Consular Officer must be competent to cope with various sorts of commissions given to him by Departments of his Government.

Under these circumstances it is hardly possible to expect that Consuls should find time to make themselves thoroughly conversant with the fluctuation of the market and exchange and the varying condition of each branch of commerce. The general public is often oblivious of this fact, and demands from the Consular Officer more than he can possibly do. Certainly trade and commerce should be one of his principal pre-occupations, and Russian Consular Officers generally devote their best energies to this object. But it is important to define in what way Consular Officers are obliged and able to further the commercial interests of their country.

State Administrator.—At the beginning it should be pointed out that it would be hardly fair to expect from a State Consular Officer a wide practical experience of trade and commerce. Judging from the various functions expected of him, it is of primary importance that he should be trained in law and jurisprudence, as all State and business affairs are thus regulated, and such knowledge is absolutely indispensable. In order to acquire such knowledge a University training is necessary, and if one adds that a thorough knowledge of statistics, political economy, and modern languages is as important for the work of a Consul as jurisprudence, it becomes apparent that a wide practical experience in commercial affairs—which requires years of actual occupation—is out of the question for a State Consul, especially as by law he is prohibited from engaging in commercial transactions himself, either directly or indirectly, and has, therefore, no personal interest in making himself conversant with the intricacies of commercial dealings. There is no subject that excites more interest both in the press and at public debates than criticism of the Consular Service, and this is due to the fact that the general public does not realise the conditions under which the Consular Service is carried out. The demand for men having wide practical experience in commercial matters to be appointed as Consuls is a *contradictio in adjecto*. Men of that description evidently would have an interest in engaging in practical business. It would pay them much better to do so than to accept the salary of a Consul, which is often just enough to make it possible to lead a decent life, and does not allow him to acquire any wealth. A Consul is a State administrator in the very essence of the word, and his connection with commercial matters can only be judged from this point of view.

Business Men as Consuls.—It has been suggested in Great Britain that Consular Officers should be business men whose remuneration should be a commission on the increase of British imported goods. This proposition is subject to two serious objections: A State Consul must be sure of a certain income and cannot depend upon the fluctuations of markets and all sorts of considerations quite outside his own control, therefore it has always been the aim of Governments to secure for their State Consuls a fixed salary. The other objection is, that if a State Consul is allowed to engage in trade and commerce, he must necessarily cease to be impartial to the different firms who may apply to him for assistance and advice. If he were personally interested in trade, he would observe naturally his own interests against the interests of his competitors, and that would frustrate the whole object of his position as a State employee and an impartial authority, who is believed to be able to advise everybody without prejudice.

Russian Regulations.—The Russian Consular Regulations stipulate that the Consular Officer shall "be concerned for the benefit of Russian trade" (Art. 1) and "shall endeavour to strengthen, facilitate, and extend the commercial relations of his own country with that in which he is stationed" (Art. 89). As the Regulations are confined to this general indication, practical experience must be enlisted to elaborate more concrete rules for consular guidance.

It is unquestionably incumbent upon all Consular Officers, whether State or elective, when application is made to them by Russian subjects, to give them, if possible, the addresses of firms, foreign or Russian, whom they may address, and with whom they may open business relations; give information as to prices and as to the reliability of firms, and, generally, to supply all the information that can be productive of advantage to the commerce of the Empire or the individual firm.

Business inquiries prosecuted by Consular Officers at the request of private individuals or firms can only be of a general character and not such as to obviate the necessity for regular business correspondents. A Consul cannot take the place of such correspondents, and any one hoping to dispense with them and to obtain the same services from the Consul is guilty of imposing upon the latter and risks injury to his own business interests. Article 3 of the Consular Regulations expressly states that Russian State Consuls are not permitted to engage in trade or industry. This makes it impossible for them to obtain the insight into commercial or industrial matters which is possessed by the private man of business. Nor has the Consul the time or the opportunity, as already stated, to make a special study of each of the many classes of business that may be prosecuted within his Consular district. Obviously, therefore, it is absurd to demand from Consular Officers services which they cannot possibly render.

Necessity for Commercial Enterprise.—The experience of every State with flourishing foreign trade has proved abundantly that the chief causes of the commercial prosperity of a nation are the initiative, the energy, the conscientiousness and the careful training of the mercantile and industrial classes themselves. The part of the administrative personnel of the Government, and this includes Consular Officers, is confined in all countries to a measure of co-operation which cannot have a decisive influence on the immediate issue of the business transaction concerned.

In Consular practice cases occur in which the parties do not wish to distinguish between that which may and that which may not be required of Consular Officers. The following is a typical instance: A firm applied to the Consulate-General in London requesting the latter to aid them in entering into business relations with English firms interested in the import of pork from Russia. The firm was informed that the question of the import from Russia of salt and cured pork is being extensively studied by the Consulate-General, that the firm's address had been communicated to the London Chamber of Commerce, in the event of purchasers of pork (bacon, hams, etc.) applying to that institution, and that the best course for the inquiring company to pursue would be to apply direct to three firms, the addresses of which were supplied. Yet the Russian firm was not satisfied with the advice given, and in a series of subsequent letters pressed the Consulate-General to find a firm which would be prepared to entertain the offer and also recommending another business house prepared to finance a coal-mining venture in Russia; in other words, there was a request that the Consulate-General should make a definite business offer and conduct the negotiations to a settlement with the English firm. The Consulate-General, however, as a Government institution, cannot undertake the responsibility of a private business undertaking, nor can it exercise pressure on an English company in order to persuade it to accept an offer made by a Russian firm. Such negotiations are a matter of private initiative.

Consular Reports.—Russian Consular Officers are under the obligation to keep the Russian Government fully informed of all that may be helpful to the interests of Russia, and especially to her commerce. Russian Consuls must, therefore, carefully study the economic resources of the country in which they live, the local products, the articles of import and export, and especially those branches of industry and commerce which afford possibilities of business relations with Russia. The knowledge of local conditions which they gather from such study enables them to make detailed reports as to the country of their residence, and to suggest means for extending the commercial and industrial operations of Russia. These proposals are the more useful if they are based on actual facts and not merely on statements gathered from official sources published with scientific or retrospective objects.

Annual Review.—At the close of each year, the Consul submits to the Ministry of Commerce and Industry a general review of the state of trade, industry, and shipping throughout the whole of his district. This report contains information about all that concerns Russian commerce and shipping. The Consul reports also upon the progress of trade and shipping at the port where he resides, and in the other ports of his district,[1] and upon the customs tariffs in force in that district, with a list of the duties charged on Russian produce. He mentions the industries that flourish most in his district, and the class of goods that are stocked in the place, and specifies those branches of trade in which Russian products play the most important part and those in which they have to compete with the products of other countries. He also mentions the prospects for Russian trade and shipping in the next year, stating the reasons upon which his opinion is based. The Consul reports annually upon the results of the harvest, the progress of agricultural industry, the fluctuations in the prices of agricultural products, etc.[2] His annual report contains also particulars as to raw and manufactured goods for which an outlet exists—either as articles of consumption or as transit goods—in his Consular district, and the branches of Russian trade which, in that district, are susceptible of greater development, with an indication of the means which, he considers, would be best adopted to ensure such development. His report mentions also the local market prices of Russian goods, as compared with those ruling at the places of their production and export; the rates of freight on such goods, under the Russian and foreign flags, and descriptions of the class of goods required by the buyers, *e.g.*, whether, in the case of wool, the preference is for fine or coarse qualities. As regards manufactured goods, the taste and fashions of the country are indicated. Periodical or spontaneous fluctuations in the prices of goods and in the cost of their conveyance by land or water, and the cause of such fluctuations, are also reported, especially with regard to goods which compete with Russian articles of export.

Style of Reports.—According to a Circular of the Russian Ministry of Commerce and Industry of November 30, 1910, No.

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[1] Russian Cons. Reg., Art. 93.

[2] *Ibid.* Art. 94.

10656, Consular reports must not only be correct as to the facts mentioned therein, but they must also have actual interest, and be written in a language easy for everybody to understand. Therefore, in these reports, concrete facts are mentioned which would be of practical use in business, and statements of a general and theoretical nature are avoided.

In throwing light upon the facts which are of importance for the interests of Russian trade those circumstances are pointed out which hamper Russian trade abroad, and those of which Russian merchants ought to take advantage. It is deemed not sufficient to report facts which occurred in the past, and measures which have been already taken by the local authorities, but it is also of importance to predict coming events by getting into touch with the local authorities, commercial and manufacturing circles, and by closely studying the economic situation of the country. Thus it is possible to inform the Russian commercial world of coming changes in the economical situation of the country in which the Consular Officer is residing.

In order to expedite matters in reporting about commerce and industry, Russian Consular Officers express themselves briefly, and send off the information which they have in hand as quickly as possible.

The text of the reports must contain statements based on statistical material, while the greater part of the figures is given in the form of separate tables joined to the report as annexes. For the sake of comparison, the figures quoted not only refer to the year under review, but also to previous years. Goods are shown as to their value and quantity.

According to prevailing circumstances of time and place, Consular reports may refer to a simple fact, or a single trade, or they may embrace all the trade and commerce of the country.

Consular Officers have the right to decide for themselves of the matter which they think desirable to report to their Government, if they do not receive queries and instructions for special reports. Their principal aim is to keep the Russian Government *au courant* of all that may be of interest to them.

Subject of Reports.—For instance, the subject of Consular reports may concern:

1. The principal articles of export from Russia into a certain foreign country, and of import from that country into Russia. Rus-

sian goods which, although not yet having been exported, could find a good market in that country. Description in detail of a foreign market, as for instance commercial customs, methods of payment, modes of packing, carriage by rail, waterways or roads, indicating the most advantageous ways of transport under the circumstances, customs duties, harbour and other fees, etc.

2. The reasons which are preventing the importation of Russian goods, as for instance premiums given by foreign Governments in order to foster their own exportation, customs tariffs, the forging of brands and trade marks, etc., and measures which could bring about an increase of the importation from Russia.

3. Cases of infraction of State treaties and agreements which have been concluded by Russia.

4. Outlining the bad or good sides of the activity of Russian merchants on foreign markets.

5. Information of coming orders to be given for products which Russia could provide, as for instance for rails, railway waggons, locomotives, mineral oils, spirit, manufactured articles, leather goods, articles for the equipment of the Army or Navy, matches, etc., enclosing, if possible, the text of the published conditions of the tender or at least its chief conditions.

6. The important events of the local commercial and industrial life, as for instance important inventions, new ways of production of goods, big strikes, the establishment of new big firms and so forth.

Publication of Reports.—According to an agreement between the Ministries of Foreign Affairs and Commerce and Industry of May 17, 1910, Russian State Consuls must report on all matters regarding trade and commerce direct to the Section of Commerce of the Ministry of Commerce and Industry, and they will receive from that institution instructions about the matter. According to a circular of August 14, 1910, from the Section of Commerce, Russian State Consuls must mark all reports of a confidential nature to prevent them from being published to the detriment of Russian interests. All information given must be in the public interest of Russia, and it must not be of a nature which would be profitable to any one Russian subject in opposition to another.

All reports of Russian Consular Officers which deserve publicity are edited in special periodicals by the Section of Commerce. They are systematically filed at the Special Commercial Intelligence Branch, which forms a part of the Section of Commerce.

Special Reports.—In addition to the Annual Report, Consular Officers send in special reports on various matters likely to interest the Russian Government. They inform the Ministry of Commerce and Industry without delay of every alteration that is made, from time to time, in the customs tariffs of the countries in which they reside. They must also send copies of all treaties and decrees already in force, or in course of publication, relating to commerce and shipping.[1] Consuls inform the Hydrographical Department of the Ministry of Marine of the erection, abolition, or removal of lighthouses, signals, buoys, and beacons, and all important changes which take place in the banks or channels at the ports and in the roadsteads of their Consular districts.[2] Consular Officers who are in a position to supply the information communicate information periodically as to the prices of commodities and the current rate of exchange at the places of their residence. They add their comments on the cause of the variation and fluctuation in such prices and rate of exchange.[3] They inform the Ministry of Foreign Affairs and also the Ministry of Commerce and Industry of all shipping and commercial cases which have required their intervention. In order to be able to help Russian merchants who may want their advice and assistance, Russian Consular Officers try to be conversant with the conditions in which goods are sold on the local market, the methods of transporting them, the local market prices, the way the customs are paid for imported goods, local commercial rules, commission agents, and so forth.

If information is given by Consular Officers about the commercial reputation, standing, and solvability of a firm, such is necessarily of a general nature and does not involve the personal responsibility of the Consular Officer. For instance, he says that he declines to take upon himself any responsibility, but gives the information to the best of his knowledge.

Record of Private Inquiries.—All replies to inquiries are given as quickly as possible, and a copy of each information which is given to private persons by a Consular Officer must be sent by him by post at the same time to the Section of Commerce of the Ministry of Commerce and Industry, Petrograd. In order to avoid wasting time in answering the same question again and again, Russian Consular Officers have the right to advise their correspondents that their applications should be made to the Commercial Intelligence Branch of the Russian Ministry of Commerce and Industry, much in the same way as is done in the British Consular service when applicants are directed to apply to the Director of Commercial Intelligence. Very often an inquiry can be answered by the Commercial Intelligence Branch because a similar inquiry has recently been made to a Consular Officer and duly answered. Consular Officers have also the right instead of answering direct to do so by the medium of the Commercial Intelligence Branch, to which they address their reply with the corresponding request.

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[1] Russian Cons. Reg., Art. 93.

[2] *Ibid.* Art. 95.

[3] *Ibid.* Art. 92.

Russian Consular Officers are required to give information to all Russian subjects applying to them, whether they reside in their Consular district or not, on all subjects relating to business and, in particular, on matters of trade and shipping, either from their own knowledge and experience, or by making inquiries of the local authorities, merchants, and others. They are also required to supply information as to the commercial matters in their districts, and to give their views as to the expediency of establishing direct business relations between Russian firms and those of their Consular districts. If the opinion entertained by a Consular Officer is not favourable to local trade, or if he is unable to speak highly of the financial conditions of the local tradespeople, he exercises every caution in giving his opinion, as he may risk prejudicing his official position without doing any service to the person interrogating him. In like manner, Consular Officers are cautious when giving information about individuals, or regarding the solvency or credit of firms, as they are unable to insure themselves against the indiscreet or compromising use of such information, while taking all the responsibility which the expression of such opinions carries. If the Consular Officer prefers to withhold the required information altogether, he can supply the inquirer with the name and address of a firm in his district qualified and willing to supply it.

Practical Proposals.—In summing up the chief points it appears that Consular Officers can only be administrative and not practical factors in trade and commerce. They devote their attention to commerce and industry in all their aspects, watching them, reporting on them, and giving all the information at their disposal for the benefit of the trade of their country. This does not satisfy the merchant class. They want a more practical commercial assistance which would benefit them more directly. This is beyond the competency of the consular service. But an outlet from the difficulty has been sought and found. I do not mean the Governmental commercial agents who are more or less labouring under the same drawbacks as the Consuls and likewise do not satisfy the practical merchant. I mean the private commercial agent of superior standing sent by one firm or several firms together. That is the man who is wanted and who might solve the difficulty.

The present propaganda for developing Anglo-Russian trade relations has in this country, famous for self-help and personal initiative, engendered a new and promising departure. In many instances a certain number of firms have joined hands in delegating a practical merchant of good standing to go out to Russia to study the conditions of trade in that country, the local requirements, habits and customs, for gathering useful addresses, getting into touch with the Russian firms and receiving from them orders. After a sufficiently long stay in Russia enabling him to get thoroughly acquainted with the branches of trade which he wanted to study, he returns to England and presents to the firms on behalf of which he went to Russia a detailed business-like report containing all the particulars which are of practical interest. There is no need to explain the advantages of this system of fostering trade. It is patent to everybody that this is the best and most practical way of doing it. The part which Consular Officers might take in this scheme is to ascertain whether the firm or the firms sending the agent are of good standing and enjoy a good reputation. If the inquiries made to that effect have a favourable result they might supply the agent with an open letter "to all whom it may concern" in the form of an introduction and recommendation, which of course is of great practical value. Here again the Consular Officer proves himself as an indispensable administrative factor in trade and commerce.

THE INDICTMENTS ACT, 1915.

[*Contributed by* G. GLOVER ALEXANDER, ESQ., LL.M.]

THE history of indictments forms a large and important part of the history of criminal procedure in England, a history which is full of absorbing interest, not only to the lawyer, but also to the student of social and political affairs. "The history of indictments," says Sir J. F. Stephen (in a chapter which is invaluable as a summary of the history of criminal procedure), "is a branch of the law of special pleading."[1] He continues: "It would extend this work beyond all limits if I were to attempt to enter upon this subject at length." *A fortiori* would this be the case in a short article. It is, however, impossible, in dealing with a subject the roots of which lie buried so deeply in our legal history, to avoid altogether some reference to its historical development.

Definition of an Indictment.—What is an indictment? The Act of 1915,[2] which came into force on April 1, 1916, gives no definition. It assumes that the old form of an indictment is well known. This is not quite logical, however unnecessary. An indictment may be described as the formal accusation (hitherto engrossed on parchment) which a grand jury presents to a Court having competent jurisdiction to try the case, charging a certain person with having committed a certain offence. It is the basis of the prosecution (whatever its form may be) in every indictable offence; and it is, as a rule, the only criminal pleading which is in writing, the prisoner's plea of guilty or not guilty, in answer thereto, being given orally.

An indictment enables, or should enable, a prisoner to know exactly what is the charge brought against him; it also enables the judge who presides at the trial to pass the appropriate sentence fixed by law, if the prisoner pleads guilty or a verdict of guilty is found against him by the petty jury after trial.

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[1] *Hist. Crim. Law*, i. p. 275.

[2] 5 & 6 Geo. V. c. 90

The majority of writers on our criminal procedure do not sufficiently emphasise the fact that we have two juries, the grand jury, whose function it is to accuse, and the petty jury, whose function it is to try the charge made by the grand jury. The indictment is the document which passes from the grand jury to the petty jury, whatever form it assumes or by whatever name it is known. It is the function of the judge who presides at the trial to decide all questions of law, including the validity of the indictment.

Exactly when and how these two juries came into existence, and how their respective functions were developed, is still an unsettled historical question, as to which a fine instance of suspended judgment may be found in Pollock and Maitland's *History of English Law*.[1] All that can be said at present is that this system of dual juries was developed in its main outlines by the end of the fourteenth century, and has remained practically the same ever since. Nor is it known exactly when the indictment assumed its modern form, and when it was first required to be in writing. Sir J. F. Stephen says it was certainly required to be in writing by the reign of Henry VII. Reeves puts it as far back as the reign of Edward I. One of the earliest, if not the earliest, collections of precedents of indictments is that appended to Lambard's *Eirenarcha* (ed. 1602). They are in Latin, and include many obsolete crimes such as "for killing a man by witchcraft," "for bewitching a Horse," "for petite treason in a servant," etc.; but the form is substantially that of the modern indictment which is well known to all lawyers who have practised in our criminal courts.

Incidentally it may be mentioned that from 1362 to 1730 indictments were written in Latin, though a free translation was read over slowly to the prisoner. By an Act of 1730 (which came into force in 1733) they were required to be in English. There is at least one case on record where the indictment was quashed for bad Latin.

Requisites of an Indictment.—Lambard[2] draws a clear distinction between an indictment and a presentment; he says that all indictments "ought to contain certainty," and mentions "the five principall things" which "be (most commonly) requisite" in indictments, viz. names, dates, places, etc., and "the manner of the fact and the nature of the offence." If to these five "certainties" there be added the more modern rules that counts must not be double, and as to the joinder of counts, we have practically all the points about which innumerable fierce contests have been waged in the criminal courts in connection with indictments.

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[1] 2nd ed. vol. ii. p. 649.

[2] *Eirenarcha*, bk. 4, Ch. V.

Coke, Hale, and Blackstone have much of interest to say about indictments; and in an appendix to the 12th edition of Blackstone's *Commentaries* [1] there is an example of a full record, including indictment, conviction, and sentence, in a case of murder tried at the assizes.

Forms of Indictments.—During the seventeenth and eighteenth centuries indictments became inordinately lengthy, prolix, complex, and highly technical. This was due to three chief causes: (1) the number of new offences created; (2) the development of the art of special pleading; and (3) the extreme severity of the criminal law. As to the first of these, one has only to look at the statute book. As to the second, there was constant action and reaction between the prosecution and the defence. The ingenuity of defending counsel in picking holes in indictments was met by the skill and ability of counsel for the Crown in closing up the loopholes. Stephen tells a story of an old special pleader who, when he had drawn a long indictment, used to "shuffle the counts" so as to confuse the defending counsel. Prisoners were not allowed the full benefit of counsel to plead for them till 1836, but long before this counsel were allowed to advise them as to the validity of the indictment and to argue any point that arose out of it. Another cause which led to prolixity and length was the fact that indictments were usually drawn by clerks of assize and clerks of the peace who, under a statute of William III.,[2] were paid for so doing a fee of 2*s*. (on pain of forfeiting £5 if they took more), but this was interpreted to mean 2*s*. for each count; and if they drew a defective bill they were required to draw a new bill without fee. There is little wonder if in these circumstances bills became lengthy and intricate. But perhaps the most cogent reason why indictments became so long and so technical was the excessive severity of the criminal law, which defeated its own ends. Human life was then cheap, and death was the penalty for all felonies, though they varied enormously in degree. There were at one time no less than 160 offences punishable with death.

In fact, it would not be untrue to say that at the beginning of the nineteenth century the condition of the English criminal law was one of barbarism, tempered by benefit of clergy and the royal prerogative of mercy, coupled with the possibility, always present, of being able to find a flaw in the indictment, and get it quashed. Hence the judges, who were mostly humane men (when there was no special reason for them to be otherwise, *e.g.* in times of great political excitement) and who, by a beneficent theory, were supposed to act as counsel for the prisoner, took advantage of any slip in the indictment to quash it, and so served the ends of justice while defeating them. This condition of things has been pictured satirically in these words :

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[1] Edited by Christian and published in 1795.

[2] 10 & 11 Wm. III. c. 23.

> Yet such was the humanity and justice of the law,
> That if in the indictment there appeared to be a flaw,
> The Court assigned him counsellors to argue on the doubt ;
> Provided he himself had first contrived to find it out.[1]

Innumerable instances might be adduced to show how the strong hand of the law was thrust aside when the penalty was out of all proportion to the offence committed, by finding fault with the indictment. Indeed it seems to have been as difficult at one time to draw a good indictment as it is now to draw a valid bill of sale. On the other hand, there were no doubt many cases where the ends of justice were improperly defeated. Such was the strictness with which every part of an indictment was viewed, that Stephen says[2] " the most trumpery failure " of proof secured the prisoner practical immunity for his crime, and the administration of justice could be compared only to the tossing up of a coin. " To give one instance where a thousand might be given " : in 1841 Lord Cardigan was indicted for shooting " Captain Harvey Garnett Phipps Tuckett " in a duel. The evidence showed that the injured man was known only as " Captain Tuckett " or " Captain Harvey Tuckett." The House of Lords, on this variance, found Lord Cardigan not guilty. This is the classic example of the failure of a criminal charge through a flaw in the indictment.

The criminal law was thus brought into discredit and contempt. The very certainty required in an indictment produced uncertainty.

Amendment of the Law.—But the early part of the nineteenth century saw great improvements both in the criminal law itself and its administration, due almost entirely to the philanthropic labours of John Howard and Sir Samuel Romilly ; and the state of the law with regard to indictments could no longer be tolerated. Acts amending the law as to indictments were passed in 1826, 1828, 1848 and 1849, as to which Sir J. F. Stephen says, " These provisions have saved a great deal of trouble." It was not, however, till 1851 that indictments were dealt with as a whole.

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[1] John Wm. Smith, *Law Magazine*, 1846, p. 191.

[2] *Hist. Crim. Law*, i. 284.

> In 1851 an Act was passed which went further in the way of removing technicalities, but it did so by an enumeration of them so technical and minute that no one could possibly understand it who had not first acquainted himself with the technicalities which it was meant to abolish. This is 14 & 15 Vict. c. 100.[1]

A long preamble to this Act sets out the evils to be remedied. Among other improvements effected by this Act, it did away with the necessity for the insertion in an indictment of any one of fifteen specified formal phrases, *e.g.* " as appears by the record," " with force and arms," " against the peace," etc. ; but it left untouched the form of the indictment.

Since the Act of 1851 nothing has been done in the way of amending the indictment until 1915. The Act of 1851 contained large powers of amending any formal defect patent on the face of an indictment. After this Act, therefore, objections became comparatively rare, so that Stephen, writing in 1882, was able to say :

> A general impression has been produced that quibbles about indictments have come to an end. It has ceased to be the fashion to make them, and if they are made they do not succeed. This is practically convenient, but on the other hand it is a very slovenly state of things.[2]

In one sense it may be said that the last state of the law, after this Act, was worse than the first, since it then became necessary for a lawyer to know not only the old law, but also the numerous statutory exceptions and amendments grafted on to it.

Reforms in the Twentieth Century.—The establishment of the Court of Criminal Appeal in 1908 might have been expected to produce a crop of appeals about indictments. But contrary to expectations the number of appeals arising directly out of indictments has not been large. Perhaps the most important of these is the case of *The King* v. *Lockett and others*[1] as to the joinder of counts or averments in an indictment and the practice of putting the prosecution to its election upon which charge it will proceed.

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[1] *Hist. Crim. Law*, i. 285.

[2] *Ibid.* i. 286–7.

In 1911 was passed the Perjury Act, the credit of which is due to Lord Loreburn, and which is in effect a codification of that branch of the law.[2] The Forgery Act, 1913, is similar.

In 1913 Lord Haldane appointed a strong Committee, with Mr. Justice Avory as chairman, to frame a bill for the reform of the law relating to indictments, and the bill so framed in due time became the Indictments Act, 1915.

The Act of 1915.—The new Act makes sweeping changes. It aims at the shortening and simplifying of indictments. By implication, though not formally, it abolishes the old form of indictment, and substitutes for it a *statement of the offence* with which the prisoner is charged, together with *particulars* of such offence. This is the scheme and idea of the Act, and it is simply the adoption and carrying out of the suggestions made by Sir J. F. Stephen in his draft code. All the provisions of the Act, including certain amendments in the law as to the joinder of charges in the same indictment (affirming the decision in the case of *The King* v. *Lockett and others*), orders for the amendment of the indictment, separate trial and postponement of the trial, etc., are subsidiary to this scheme.

The Act is to be carried into effect by means of rules; the first rules are contained in the first schedule, and form part of the Act itself. New forms of indictment are set out in the Appendix. The new forms are very like the abstracts of indictments prepared for the use of the judges at assizes.

The Rule Committee.—A feature of the Act is the establishment of a Rule Committee, to consist of the Lord Chief Justice, a Judge of the High Court, a Chairman of Quarter Sessions, a Recorder, a Clerk of Assize, a Clerk of the Peace, and one other person "having experience in criminal procedure," with extensive powers to make new rules varying or annulling those contained in the first schedule to the Act as experience in the working of the Act may require, subject to the usual provision as to such new rules being laid before Parliament. This Committee is a great advance on the rule-making authority under the Poor Prisoners' Defence Act, 1903.

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[1] [1914] 2 K.B. 720.

[2] The history of the efforts towards codification of the criminal law formed the subject of a striking article by Mr. H. J. Randall entitled "The Resurrection of the Criminal Code" in the *Law Quarterly Review*, vol. xxvii. p. 209 (1911).

An important extension of the powers of the Rule Committee is the provision that " the provisions of this Act relating to indictments shall apply to criminal informations," and inquisitions, and also to all other criminal pleadings. Such Rule Committees already exist under the Judicature Acts and County Courts Acts, and deal with the whole procedure under these Acts ; it is to be hoped that the new Rule Committee may soon be empowered to deal with the whole of criminal procedure, of which pleadings form only a part. The establishment of this Rule Committee with its powers of amendment goes far to meet the stock argument against codification, viz. rigidity and want of elasticity.[1]

The most important provisions of the whole Act are to be found in Rule 4, viz. :

> (3) The statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by statute, shall contain a reference to the statute creating the offence.
>
> (4) After the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary.

These new provisions are really the kernel of the whole Act.

Another new provision of considerable value is Rule 13 (1) :

> It shall be the duty of the clerk of assize after a true bill has been found on any indictment, to supply to the accused person, on request, a copy of the indictment free of charge.

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[1] The Statutory Rules contained in the first schedule are to be cited as the Indictment Rules, 1915. The Rule Committee has published (1) the Indictment Rules, 1916 (dated March 18, 1916), and republished (dated May 3, 1916), annulling certain of the forms given in the Rules of 1915, and substituting others therefor, as well as giving additional forms ; and (2) the Indictment (Criminal Information) Rules, 1916 (dated April 10, 1916).

But why is this provision put amongst the rules? Surely it is intended to be permanent.

From what is just said the draftsmanship of the Act is not altogether free from objection. The arrangement of the sections is open to criticism. They do not seem to come in the natural order. The phraseology is somewhat peculiar, *e.g.* "endorsed on the back" seems somewhat tautological. The rules use the expression "in ordinary language" at least four times. The expression used by Stephen is "in popular language." The difference is no doubt slight; the important words being "avoiding as far as possible the use of technical terms."

The Value of the Act.—The Act leaves untouched (1) the powers and functions of the grand jury and (2) the distinction between felonies and misdemeanours; both of which have been subjects of discussion by legal reformers for some time. As it stands, the Act has not altogether escaped criticism. Thus that veteran criminal lawyer Sir H. B. Poland says:

> Although I do not like the Act, as I think it goes too far, it is only right to recognise the great labours of Mr. Justice Avory and the other members of the Committee.[1]

One can understand and sympathise with this feeling, which will be shared by many lawyers bred in the old school, and who will, no doubt, dislike what they may regard as unnecessary change. After all the law is a technical subject, and cannot be stripped entirely of its technicalities. There is a danger, in making it popular, that it may become vague and uncertain. But the criminal law and its procedure, above all branches of the law, ought to be made as clear, short, and easy to understand as possible; and this is the great justification of the Act. The difficulty is in this, as in other matters, to hit the happy mean. This Act, on the whole, does so, and effects a much-desired reform long overdue. It is a decided improvement on the old state of affairs. It was almost impossible for an ordinary man, although intelligent and educated, to understand the charge set forth in the old form of indictment, in an ordinary criminal case, without several years of special training. Much less was it possible for the majority of accused persons who, as a rule, are not educated, to do so. Now he that reads may understand.

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[1] Introduction to Mr. Herman Cohen's edition of the Act.

The Act, though it does not profess to be a code, nor even a consolidation Act, but only an amending one, marks a decided step, along with the Perjury Act, 1911, and the Larceny Bill now before Parliament, towards the codification of the criminal law and bears testimony to the seminal influence of Stephen's work.

The Law in other parts of the Empire.—It is of interest to note the extent to which the influence of Sir James Stephen's work has been felt in other parts of the British Empire. Scotland, so far back as 1887, anticipated England in the reform of procedure by indictment; and the Act of 1915 follows on very much the same lines as the Criminal Procedure (Scotland) Act, 1887.[1] The Dominions have made considerable use of Sir James Stephen's Code.

Canada.—In Canada, Part XIX. of the criminal code [2] deals with Procedure by Indictment (ss. 843–1025). It contains first general provisions as to indictments which are similar to those in the English Act, and provides: "It shall be sufficient if an indictment begins according to form 63 or to the like effect." It then proceeds to deal with special cases. Amongst other provisions it enacts "every count of an indictment shall be sufficient if it contains *in the form of a statement* the substance of the offence specified," and "such statement may be made in popular language, without any technical averments," and may "be in the words of the statute describing the offence or otherwise." Form 64 gives examples of the manner of stating offences. The circumstances of the alleged offence are to be set out with so much detail—

> as is sufficient to give the accused reasonable information as to the act or omission to be proved against him and to identify the transaction referred to.

The forms 63 and 64 are given in a schedule and are very similar to those in the English Act.

There is no special provision in the Canadian Code for the making of rules as to indictments, but by s. 576 "every superior Court of criminal jurisdiction" in Canada has power to make general rules of court dealing with criminal procedure and pleadings.

[1] 50 & 51 Vict. c. 35.

[2] Chap. 146 of the Revised Statutes, 1906.

Since the Canadian Criminal Code was passed in 1906 it has been found necessary to pass no less than sixteen different Acts amending or adding to it, but some of these deal with small points and apparently none of them touch or affect the subject of indictments.

New Zealand.—In 1908 New Zealand enactments relating to crimes and criminal procedure were included in the general consolidation of the law. The statute containing them is known as the Crimes Act, 1908,[1] and takes the place of a previous Act passed in 1893. It does not profess to be a code, but it is in effect a code. Ss. 386–406 deal with indictments, and ss. 407–13 deal with the preferring of indictments. S. 386 (1) provides: "It shall not be necessary to state in any indictment that the jurors present upon oath"; (2) "It shall be sufficient if an indictment begins in the form numbered 3 in the third schedule hereto, or to the like effect:" Its provisions as to the form of indictments and contents of counts are almost identical with those of the Canadian Code. It provides for the giving of "details of circumstances," and that—

> the Court may, if satisfied that it is necessary for a fair trial, order that further particulars in writing of such document, words, means, person, or thing be furnished by the prosecution (s. 389);

and such further particulars are to be delivered without charge to the accused or his solicitors (s. 391). S. 392 confers ample powers of amendment on the Court of trial in case of variance between proof and indictment, "if the Court is of opinion that the accused has been misled or prejudiced in his defence by any such variance, error, or omission," and it has a power to adjourn or postpone the trial. The examples of "the manner of stating offences" given in the third schedule are almost alike, word for word, with those given in the Canadian Code.

By s. 354:

> Any three or more of the judges of the Supreme Court (of whom the Chief Justice shall be one) may, at any time and from time to time, make such rules for regulating practice, pleading, and procedure under this Act as may be found necessary,

such rules to be laid before Parliament before they come into operation.

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[1] 1908, No. 32.

Two amending Acts have since been passed, a fairly long one in 1910 (No. 15), and a very short one (No. 17) in 1915 ; but neither of them in any way affects procedure.

Queensland.—In 1899 Queensland passed " An Act to Establish a Code of Criminal Law " which may be cited as " The Criminal Code Act, 1899," [1] of which ss. 560–74 deal with indictments. S. 560 provides :

> When a person charged with an indictable offence has been committed for trial, and it is intended to put him on his trial for the offence, the charge is to be reduced to writing in a document which is called an indictment ;

and this indictment—

> is to be signed and presented to the Court by a Crown law officer, or by some other person appointed in that behalf by the Governor in Council.

This is interesting, because it appears there is no grand jury in Queensland, and the signature of such officer or person takes the place of a finding by a grand jury. S. 564 deals with the form of indictment, which must—

> set forth the offence with which the accused person is charged in such a manner and with such particulars as to the alleged time and place of committing the offences, and as to the person, if any, alleged to be aggrieved, and as to the property, if any, in question as may be necessary to inform the accused person of the nature of the charge. . . . It is sufficient to describe an offence in the words of this Code or of the Statute defining it.

S. 565 contains general rules applicable to indictments, and s. 566 deals with particular indictments. S. 573 provides for the delivery of particulars to the accused person of any matter alleged in the indictment, with power to adjourn the trial for the purpose of such delivery ; and s. 574 provides :

> The provisions of this chapter as to indictments shall apply to summary convictions for indictable offences.

S. 595 provides for the delivery of a copy of the indictment on application, without fee. S. 707 provides :

> The judges of the Supreme Court may make general rules prescribing

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[1] 63 Vict. No. 9.

forms of (*inter alia*) indictments, and other proceedings to be used in any court; and every form so prescribed is to be deemed sufficient for the purpose.

This Code was drafted by Sir Samuel Griffith, and it strikes one, on the whole, as being exceedingly clear, concise, and practical.

Since 1899 it has been found necessary to pass only four amending Acts, one of which, in 1913, established a Court of Criminal Appeal, and another, in 1914, made provision for the detention and control of habitual criminals.

There is a strong likeness between these three statutes which are typical of the criminal laws in the Overseas Dominions. They all run on similar lines, although the arrangement is somewhat different, depending, no doubt, on local circumstances and the tastes of the respective draftsmen. They show how far ahead of the old country in some respects are those young and vigorous dominions beyond the seas, which are the inheritors of the common law. One fact stands out boldly, viz. the predominating influence of Sir J. F. Stephen's ideas and life-long work.

The English Act now does something to redeem the old reproach that English law is a "sort of *hocus-pocus* science," the "glorious uncertainty" of which is of more use to the legal profession than the justice of it (Macklin);[1] that it is a "lawless science," a "*codeless* myriad of precedent" (Tennyson);[2] and brings it more nearly to the level of an exact science. So far as England is concerned the Act is an experiment, but it is an experiment which has succeeded elsewhere, and there is no reason why it should not do so here.

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[1] *Love à la Mode*, 1759.

[2] *Aylmer's Field.*

SIR JOHN FORTESCUE.[1]

[*Contributed by* H. J. RANDALL, ESQ.]

The Fifteenth Century.—The period of the Wars of the Roses is about the least interesting in English history. This is partly caused by lack of knowledge, for the historical sources of the period are scanty, and many are bad; but there is a more profound reason. Stubbs struck the right note in pointing out that the dominant characteristic of the age was its essential futility. It was a century of continuous war, but of war of a sordid character, not ennobled by any great object of policy. The adventures of Glyndwr in Wales devastated that country, and left marks that the passage of a century was hardly able to efface. The reopening of the French War under Henry V. was totally without moral justification, whatever its economic causes may have been, and if contemporaries were blinded by the glories of Agincourt, those glories had to be paid for by long years of exhausting and unsuccessful warfare. Hardly had the soil of France (except for the outpost of Calais) been cleared of the English invader when the Wars of the Roses broke out, to continue, as they had begun, in a long series of personal and family quarrels, and with no result but the further exhaustion of the realm.

The whole cause of this futility may be summed up in the words of the declaration made by Henry IV. at his accession; "the which realm was in point to be undone for default of governance and undoing of the good laws." The failure to remedy that default was the measure of the failure both of the Lancastrians and the Yorkists. Success in doing so was the measure of the success of the Tudors.

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[1] The following paper makes no pretence to being the result of original research. As far as Fortescue is concerned there is one authority *par excellence*, viz. Mr. Charles Plummer's edition of the *Governance of England* (Clarendon Press, Oxford, 1885), and the greater part of the article is founded exclusively upon the authority of Mr. Plummer's work. It is hardly too much to say that it is in every way the model of what such an edition should be. The writer is also indebted to the kindness of Sir Frederick Pollock, who perused the MS. and made several valuable suggestions.

From the point of view of constitutional history, the Lancastrian period is of great importance, but its importance was prospective, not immediate. The constitutionalism of the kings supplied a valuable series of precedents to later ages, but the experiment failed, because it was premature and unsuited to the needs of the times. The progress of successful political development is always the same—"Order first, reform afterwards." The crying needs of the fifteenth century were the suppression of anarchy and private war, the enforcement of justice, and the reform of taxation. Until these had been attained the very foundations of a stable constitutional government did not exist. The Lancastrians were too weak in title and above all too poor in pocket to enforce the maintenance of administrative order, and so we have the story of this "bloody, futile, and immoral" age. That story may be read in a calm and judicious form in the pages of Stubbs, in more trenchant and vigorous language in Mr. Plummer's Introduction to Fortescue's *Governance of England*, but it is portrayed more clearly because more unconsciously in the wonderful picture of contemporary society afforded by the Paston Letters.

The Life of Fortescue.—The life of Fortescue is not known in any great detail, nor have we sufficient materials to determine his character intimately. He was the scion of an old Devonshire house, and was most probably born in the last decade of the fourteenth century. There are statements that he was educated at Exeter College, Oxford, and he was certainly a member and Governor (as the title then was) of Lincoln's Inn.[1] As a Devonshire man he travelled the famous Western Circuit, and took the degree of serjeant-at-law in 1429 or 1430. His practice at the Bar was evidently a prosperous one, because there are clear records that he acquired considerable landed property apart from his family inheritance. In 1440 and 1441 he acted as a judge or commissioner of assize. In January 1442 he was created Chief Justice of the King's Bench, and was shortly afterwards knighted. Into the details of his career as a judge it is hardly necessary to enter. The practice of employing judges upon extra-judicial work was evidently as rife in the fifteenth century as in our own time, and Fortescue was employed on several occasions upon special commissions. Of the character of his judicial

[1] Various references to him will be found in the *Black Books* of Lincoln's Inn, vol. i.

work we really know little, but in those days a judge was hardly expected to be above politics. Fortescue confesses that he was "a partial man," which meant in his case a strong Lancastrian. In such a period as the Wars of the Roses no prominent person could avoid taking sides, and Fortescue through good and evil fortune followed the king to whom he had sworn allegiance until the cause of the House of Lancaster was hopeless beyond possibility of resurrection. During a period when most politicians swam with the flowing tide the faithfulness of the great Chief Justice through exile and adversity may reasonably be likened to that of Clarendon under like conditions in another age.

During the tenure of office, which lasted until 1460, Fortescue was prominent upon various special commissions, as a trier of Parliamentary petitions, probably as a draftsman of Acts of Parliament, upon the occasions of State Trials, and when the judges were consulted by the Council.

After 1460 he ceased to preside in the King's Bench, and followed the fortunes of the Lancastrian party, which may be read at large in the histories of the times. In the negotiations with Warwick which led to the restoration of Henry VI. in 1470, Fortescue seems to have taken a prominent part. He finally landed with Queen Margaret at Weymouth on Easter Sunday, April 14, 1471—the selfsame day on which Warwick had been overthrown and slain on Barnet Heath and Henry VI. once more taken prisoner. The Lancastrian cause was lost indeed. Margaret endeavoured to gain the strongholds of her party in the North, but at Tewkesbury her little army was intercepted and crushed. Prince Edward, the heir to the throne, was killed, Queen Margaret taken prisoner, and within three weeks Henry VI. was dead.[1]

Fortescue was among the prisoners at Tewkesbury, and his cause being now utterly hopeless, submitted to the conqueror. In October 1471, he was formally pardoned and admitted a member of the King's Council. He was further required to refute the arguments that he had used against the title of Edward IV., and this he did in the tract entitled "The Declaracion made by John Fortescue, knyght, upon certayn wrytinges sent oute of Scotteland, ayenst the King's Title to the Roialme of England." Upon the morality of abandoning a hopeless and utterly defeated cause we will offer no opinion; it is a matter of individual temperament upon which each one will hold his own view. This task accomplished, his attainder was reversed and his estates restored. For the rest of his days he appears to have lived upon the property that he had purchased in 1456 at Ebington in Gloucestershire, and is buried in the parish church. The date of his death like that of his birth is unknown, but there is no record of his name after February 1476. He must certainly have lived to a ripe old age, even if the tradition that he attained the age of ninety cannot be relied upon.

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[1] Fortescue described himself as "cancellarius Angliæ" in the title to the *De Laudibus* and in other places. The question as to whether he was ever really chancellor is discussed at length in Foss's *Lives of the Judges*, vol. iv. pp. 310–12. He certainly has no title to a place in the regular series, and Foss concludes that the title was a nominal one given during the exile of the Lancastrians.

It will be convenient to mention briefly in the first place the chief works of Fortescue, and then to consider separately the chief theories of which he is the author, and especially his views on the Constitution.

"De Natura Legis Naturæ."—According to the writer of the article in the *Dictionary of National Biography* none of Fortescue's works but the *Governance of England* and the *De Laudibus* has any interest "except for the minute student." We will accept this view, and content ourselves with a brief mention of the miscellaneous works. The most important of these are contained in a succession of tracts upon the question of the Lancastrian title which are of considerable value to the historian, but of comparatively little interest to the jurist. The longest and most general is the treatise entitled *De Natura Legis Naturæ et de ejus censura in successione regnorum suprema.* It is couched in the form of an argument on this hypothetical case. The King of the Assyrians and monarch of the whole of Greater Asia has a daughter and a brother. The daughter has a son, but the King has not. "The question is whether the kingdom of the king so deceased descends to the daughter, the daughter's son, or the brother of the king." The first part of the book is devoted to a consideration of the law of nature by the light of which the question is to be decided. Fortescue founds the law of nature upon the "golden rule," *i.e.* "Do unto men as ye would that men should do unto you." According to Mr. Plummer his views of the law of nature are derived partly from the canon law, but mainly from St. Thomas Aquinas and Ægidius. They run upon the same main lines as those of his contemporary Pecock.[1] The subject of the position of the law of nature in mediæval and Renascence times is a very wide one, and Fortescue's contributions towards it are not, like those of Hooker nearly a century and a half later, of first-rate importance. It would therefore be out of place to consider the matter in sufficient detail to be really intelligible.

In the second part of the *De Natura* Justice sits to hear the arguments of the rival claimants, and as the pamphlet was written to support the Lancastrian cause, decides in favour of the brother. Of the work in general Mr. Plummer says (Intro. p. 78):

> The arguments are of great subtlety and of interminable length. Men were more patient of length and dulness in the Middle Ages than we are now; still one is inclined to pronounce that, considered as a political pamphlet, the work lacks the primary condition of success, namely readableness.

The "De Laudibus Legum Angliæ."—This is by far the best-known and most popular of all the works of Fortescue, and until 1714 was the only one in print. It was first printed in 1537 and thirteen editions are mentioned down to that of Lord Clermont in 1869. The chief difficulty in dealing with it is that it still awaits a critical editor. Unfortunately Mr. Plummer and the Clarendon Press did not follow up the edition of the *Governance of England* with a similar edition of the *De Laudibus*. The matter is of importance, because some of the best-known and most quoted passages in the book, such as the famous description of the Inns of Court, have been suggested (though possibly on insufficient grounds) to be later interpolations.[2]

The form of the work is that of a dialogue with, or exhortation to, Prince Edward of Lancaster, and the date of its composition can be definitely fixed in the years 1468–70 during the exile of the Lancastrians at St. Mighel in Barrois.

The *De Laudibus* can in no way be regarded in the light of a treatise on the law or upon any large section of it comparable with the works of Bracton or Coke. It is an exhortation to the Prince to obtain a nodding acquaintance with it—as a later age would have said, as a gentleman and not as a lawyer—and insists that such an acquaintance need not be a matter of prolonged study (Chap. VIII.). The subjects considered are therefore comparatively few. After the preliminaries Fortescue proceeds to insist upon that distinction between "political" and "regal" government (dominium politicum et dominium regale) that is never absent from his mind, and goes on to make a few observations upon the law of nature. The greater part of the remainder of the dialogue is a comparison between the civil law and the English in points in which they differ—the conclusion invariably being that the English rule is superior. The first matter is that of procedure, and is chiefly interesting from the historical point of view as a description from a witness of first-class competence of the procedure of the time. Again Fortescue recurs to his Political and Regal Government, and then proceeds to discuss the *legitimatio per subsequens matrimonium*. Of course he defends the English rule with much curious reasoning and great wealth of scriptural quotation. Whether a later age adopts his conclusion or not, the reasoning of the fifteenth century will hardly appeal to it. This leads to a consideration and rejection of the Roman law rule that "Partus sequitur ventrem" in the case of a servile marriage, with even more curious special pleading. The tuition of orphans and manifest and non-manifest theft are next discussed, and then the Prince's question as to why the laws of England are not taught in our universities produces in reply the famous panegyric of the Inns of Court. In conclusion the Prince raises the eternal question of the law's delays. Fortescue replies, in effect, that in the first place delays are much worse in France, and in the second place that delays in legal proceedings within reasonable limits are really necessary for the attainment of justice. "Judgment is never so safe when the process is hurried on."[1] He gives an instance from his own recollection when a woman was condemned at Salisbury Assizes for the murder of her husband, and executed, and at the next assizes a servant was condemned upon his own confession for the same murder, after entirely absolving the wife from complicity. He thinks fit, however, to add the saving plea in confession

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[1] *The Repressor of Overmuch Blaming of the Clergy.* The standard authority is the edition by C. Babington in the Rolls Series, 2 vols., 1860. There is a good account of Pecock in *Cambridge History of English Literature*, vol. ii. p. 287, with the usual excellent bibliography.

[2] *E.g.* Pulling, *Order of the Coif*, pp. 153–4.

[1] "Nec unquam in judiciis tantum imminet periculum, quantum paret processus festinatus."

and avoidance that if any defects should exist, they can always be amended by Parliament.

"The Governance of England."—This is the work edited by Mr. Plummer and is historically the most important of them all. It is commonly called the *Monarchia*, but there is no doubt of the superiority of the alternative title that Mr. Plummer has taken from the Yelverton MS. The descriptive title or preface that the scribe prefixed to the Cambridge MS. is also worth quoting :

> A Treatise intituled Jus Regale and Jus Politicum et Regale, comprehending for good Example memorable Councells of Estate Affaires: namelie as touchinge the King's charges ordinary and extraordinary, Enlarginge of the Revenewes of the Crowne, disposeinge of Offices and Rewardes for service, ellecting of Councelloures, and the disposeinge and orderinge of all other affaires of the Kinge, Kingdome and Court.

The transparent honesty of the writer, his strong patriotic feeling, and the singular form that it sometimes assumes, his longing for good governance, and his vigorous direct and nervous style combine to make the work one of extraordinary interest. Many of his expressions are extremely happy. "Exquysite means of geytinge of good" (p. 119) is one, and "so his hyghnes shall haue Þeroff, but as hadd Þe man Þat sherid is hogge, muche crye and litil woll" (p. 132) is another. As a more lengthy specimen of his style we may perhaps be permitted to quote the famous comparison between English, French, and Scotch courage (Chap. XII., p. 141) :

> Wich provith þat it is not pouerte þat kepith Ffrenchmen ffro rysinge, but it is cowardisse and lakke of hartes and corage, wich no Ffrenchman hath like vnto a Englysh man. It hath been offten tymes sene in Englande þat iij or iiij theves ffor pouerte haue sett apon vj or vij trewe men, and robbed hem all. But it hath not bene sene in Ffraunce þat vj or vij theves haue be handy to robbe iij or iij trewe men. Wherfore it is right selde þat Ffrenchmen be hanged ffor robbery, ffor thai haue not hartes to do so terable an acte. Ther bith therfore mo men hanged in Englande in a yere ffor robbery and manslaughter, then þer be hanged in Ffraunce ffor such maner of crime in vij yeres. Ther is no man hanged in Scotlande in vij yere to gedur ffor robbery. And yet thai ben often tymes hanged ffor larceny, and stelynge off good in the absence off þe owner þeroff. But þer hartes serve hem not to take a manys gode, while he is present, and woll defende it ; wich maner of takynge is callid robbery. But þe Englysh man is off anoþer corage. Ffor yff he be

pouere, and see another man havynge rychesse, wich may be taken ffrom hym be myght, he will not spare to do so, but yff þat pouere man be right trewe. Wherfore it is not pouerte, but it is lakke of harte and cowardisse, that kepith the Ffrenchmen ffro rysynge.

The chief topics of the book we purpose to discuss below under their appropriate headings. It is only necessary to mention here that there are two theories about the date of composition. One would suggest that it was written in the Lancastrian restoration of 1470, and recast by the author for Edward IV.; the other that it was originally written for Edward IV. and mutilated in some copies by later Tudor scribes. Mr. Plummer inclines to think that the latter theory is the more tenable.

General Character of Fortescue's Works.—The chief works of Fortescue are commonly referred to as "treatises," and to a reader unacquainted with them the word is apt to create a wrong impression. They are totally unlike the long and comprehensive works of Bracton or Coke. In truth they are tracts or pamphlets of quite moderate compass, and not in the least encyclopædic and laborious compositions covering a wide field.

In the same way Fortescue differs essentially from most of the jurists of the Middle Ages. There is no very great parade of learning in his books, and the matter that distinguishes them above all other things is their practicality. We may concede that he possessed a fair amount of book learning, but knowledge of men and things and practical affairs is the feature that appears most strongly. He was a traveller on the Continent not from choice, but by compulsion, and he used his travels to observe attentively the actual institutions and social conditions that obtained—especially in France.

In this connection it is well to remember that Fortescue lived in the fifteenth century. The long controversy on the relations between the Papacy and the Empire—the background of all mediæval political theory—was drawing to a close in the Conciliar movement. Bartolus of Sassoferrata and Marsiglio of Padua, the last of the really great mediæval jurists, had flourished in the preceding century. Bartolus resembled Fortescue in his practical aspect of mind, but he possessed a wealth of learning to which Fortescue could not pretend. He had worked out a theory of the relation between the Papacy and the Empire that made a place for the existence of the independent national state. On the other hand the Renascence had hardly yet begun. More than fifty years intervenes between the composition of the *Governance of England* and the publication of Machiavelli's *Prince*, and over a century before Bodin in his *Commonwealth* definitely promulgated the theory of sovereignty and ushered in the modern period in political thought. There does not seem to be any evidence in the works of Fortescue that he had really studied and appreciated the essential factors in the political theory of the Middle Ages. The relations between Pope and Emperor, the validity and effect of the Donation of Constantine, the reconciliation of the theories of Aristotle and those of the Roman jurists, the significance of the formula " Rex in regno suo est Imperator regni sui "—all these matters Fortescue never mentions. The theoretical difficulties of the civilians he left aside if he ever knew of them ; but he believed sincerely from practical observation in the superiority of the English polity and the superiority of the English people, and he was greatly troubled lest that superiority should be jeopardised " for default of governance and undoing of the good laws."

Comparison of English with Roman Law.—The consideration of the *De Laudibus* leads one to a question that is interesting to ask even if it is impossible to answer. The pamphlet is chiefly taken up with certain comparisons between the English and Roman law—always to the advantage of the former. It was probably composed for the perusal of Edward IV. Fortescue speaks of the civil law in terms of high respect,and of the canon law in terms that attribute to it divine inspiration. As to his actual knowledge of either system it is impossible to dogmatise, but the *De Laudibus* does not necessarily imply any wider knowledge than could be attained from a perusal of any mediæval compendium, from conversations that Fortescue would certainly have had with French lawyers during his years of exile, and from observations made at the same time upon French procedure. But the point of interest is a different one. Why does Fortescue think it advisable to cast his exhortation to Prince Edward to study the laws of his own country in the form of a demonstration of the superiority of these laws over the civil ? Maitland has shown in his famous *English Law and the Renaissance* that there was a very distinct danger in the reign of Henry VIII. that an attempt would be made in England to imitate the German and Dutch reception of the Roman law, or the nearer reception north of the Tweed. J. R. Green would date the beginnings of the "new" Tudor absolutist monarchy back at least to the beginning of the reign of Edward IV. The fundamental maxim of the later Roman law, "Quod principi placuit legis habet vigorem," was infinitely more pleasing to a monarch of absolutist leanings than the ancient English books with their talk of charters and liberties. Was this movement towards a "reception" that grew so alarmingly in the times of Bluff King Hal showing premonitory symptoms under Edward IV.? We cannot say definitely, but it is curious that Fortescue should have been at such pains to demonstrate the superiority of English law to Roman, if there had not been others who were arguing in a contrary sense.

Constitutional Theories. Omissions.—If anything were needed to demonstrate the fragmentary and pamphlet character of Fortescue's works, it could be found in the subjects that he omits. Except for one or two incidental references the first of our constitutional writers does not mention either Parliament or Magna Carta. The omission of any reference to Parliament is quite the reverse of what one would expect in a writer who had lived through the whole of the Lancastrian period. We do not think that the explanation lies in any wish to ignore the national assembly, but rather in the object that Fortescue had in mind. Parliament was then in working order, and Fortescue simply assumes its existence. If he had intended to write a systematic constitutional treatise, he would have described the working of the central assembly fully, but that was not his purpose. The *Governance of England* is a pamphlet, and a pamphlet with a definite practical object in view. It is not a constitutional treatise, but a scheme of constitutional reform. In fact, to compare with a later age, Fortescue was not the Blackstone but the Bentham of the fifteenth century.

The omission of any reference to Magna Carta or the charters generally is simply characteristic of the time. Dr. McKechnie has pointed out that during the fifteenth and sixteenth centuries Magna Carta suffered from comparative neglect. For practical purposes many of its provisions had become antiquated, and others had reference to a condition of society that had passed away. The revival of interest in the Charter took place in the seventeenth century when the writings of Coke (particularly the *Second Institute*) placed it upon a pinnacle of sanctity from which it has never been displaced. Coke and his followers used it as one of the chief dialectical weapons in the constitutional conflicts of the seventeenth century, but they did so by treating it in a manner that was radically unhistorical, and by reading into its provisions the law and social conditions of a later age. Fortescue lived before this revival or perversion, and he therefore simply ignores it.

The Forms of Government.—The theory of the difference between *dominium regale* and *dominium politicum et regale* is undoubtedly the most original contribution of Fortescue to political thought. Of its importance he was fully conscious. He emphasises the matter in every one of his chief works, and particularly places it in the forefront of the *Governance of England*. He begins that work by saying:

> Ther bith ij kyndes off kyngdomes, of the wich that one is a lordship callid in laten *dominium regale*, and that is callid *dominium politicum et regale*. And thai diuersen in that the first kynge mey rule his peple bi suche lawes as he makyth hym self. And therfore he may sett vppon thaim tayles and other imposicions, such as he wol hym self, with owt thair assent. The secounde kynge way not rule his peple bi other lawes than such as thai assenten unto. And therfore he may sett vpon thaim non imposicions withowt thair owne assent.

It is true that Fortescue makes no claim to originality for his views, but on the contrary supports them by a parade of scriptural and mediæval learning. That however is really of no importance, but is merely a characteristic of the times. The whole of mediæval thought is based upon the appeal to previous written authority. For a writer in those ages to have put forward a theory as an original contribution to thought, upon the basis of its intrinsic merits, and without any reference to the Scriptures, the Fathers, Aristotle, or the civilians, would simply have been treated as an act of unparalleled presumption, and would have prevented him from receiving any serious consideration even if he had escaped a charge of heresy. Fortescue accordingly appeals to the Scriptures to "Seynt Thomas," Roger of Waltham, Ægidius Romanus, Diodorus Siculus and so forth; but Mr. Plummer has demonstrated that in none of these authors can there be found any real appreciation of the distinction between absolute and limited or constitutional monarchy.[1] The credit of the theory belongs to Fortescue alone, and he founded it not upon previous authority, but upon his own observation and reasoning. This is incidentally shown by the fact that after discussing his authorities for two chapters, he devotes a third to a comparison between the results of *dominium regale* in France and those of *dominium politicum et regale* in England. The scholar and his authorities are thrown aside, and the practical statesman at once appears with the conclusion, "sumwhat now I have shewid the frutes of both lawes, *ut ex fructibus eorum cognescetis eos*." The whole point of view of this chapter with its definite basing of political theory upon the results of actual observation is strikingly original, and is a distinct foretaste of the not far distant Renascence.

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[1] It might have been admitted by these writers that an *elective* king could have limited powers—but only because he was not quite a real king. It is interesting to compare the way in which Bodin in 1576 deals with the English monarchy.

The argument cannot have been altogether acceptable to a king with absolutist tendencies, and there is a very curious attempt to conceal the powder in the jam in the argument that both kinds of king are equal in estate and power. As the "politic" king cannot legislate or impose taxation without the assent of his subjects this courtly argument presents some difficulties. He maintains:

> that both kings are equally like God, for though the law of an absolute monarchy is more like the law by which God governs the world, yet the law of a politic monarchy is more like that by which He rules His saints in bliss,[1]

and goes on to argue that a limitation upon the power of doing wrong is an increase rather than a limitation of power. Mr. Plummer demonstrates the antiquity of the position, and adds (p. 218):

> as to the value of the argument in itself, it seems to rest on a confusion between the inability to do wrong which comes from the state of the will, as in the case of God and the angels, and that which is the result of mere external limitations. To say that the latter are in any real sense an increase of power seems absurd.

Truly the way of those who would argue kings out of absolutism is hard.

Two further points may be noted upon this theory in connection with our previous observations as to Fortescue's knowledge of Roman law. There were two distinct lines in mediæval political thought, one based upon the Roman law, and the other upon Aristotle.

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[1] Plummer, p. 179.

The reconciliation of the two was naturally a task of no small difficulty. It is noteworthy that all the authorities quoted by Fortescue were Aristotelians, and he nowhere seems to refer to a civilian by name.

Again, he speaks of the governmental and legislative power as "dominium," not as "imperium." One of the hardest tasks of the civilians was to reconcile the Roman "imperium," the characteristic of a World State, with the actual exercise of political power in a world of states. Bartolus, for instance, is perpetually struggling with this difficulty, which was finally solved by the formula "Rex in regno suo est Imperator regni sui." Fortescue never knew of the problem or used the word Imperium. Moreover, it is hardly likely that a trained civilian would not only have ignored the Imperium, but would have used the word for property to express the idea.[1]

Fortescue not only propounds the distinction between absolute and constitutional monarchy, but he also has a theory as to their different origins. In a word it is, that dominium regale was first founded on conquest and the might of the prince, dominium politicum et regale upon the consent of the people. In the *Natura Legis Naturæ* he contends that monarchy is an institution of the law of nature: "as aftir the saynge of the philosopher euery comunalte vnyed of mony parties must nedis haue an hed"—and because man is naturally a social and political animal. This part of the theory is probably devised from Vincent of Beauvais.[2]

Finance.—Upon the practical side the two great questions that are always before the mind of Fortescue are those of finance and of administrative order. It would be out of place in a paper primarily devoted to his position as a jurist to discuss these views at length, but they are of prime importance to the constitutional or economic historian. He begins with a vivid description of France—evidently the result of his own observation. It would seem to show that some of the seeds of the French Revolution can be traced back earlier than the time of Richelieu.

The main matter that troubles Fortescue is the poverty of the Crown. In that he has undoubtedly hit upon one of the chief causes of the Lancastrian failure, and the results could not be summarised better than in the chapter on "The Harme that comyth of a Kynges Poverte." Poverty leads to borrowing, which increases the loss, the non-payment of wages makes subjects disaffected, and gifts have to be made by assignment instead of being paid in cash, but the greatest part of the harm is that the king is compelled to resort to "exquisite meanes of getyng of good." No realm can prosper under a poor king.

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[1] It can be noted, however, that Dominium was the official designation of the Republic of Venice. *Vide* Du Cange

[2] Plummer, p. 180.

There follows a detailed account of the king's ordinary and extraordinary charges, and finally after a survey of the position we come to the remedy—"How that the Crowne is beste to be indowed." Fortescue pronounces against taxation, after considering the effect of the salt gabelle and the tax on wines in France, and he really goes back to the mediæval idea that the king should live of his own. He wants to see the king as the greatest landowner, the feudal dues strictly enforced, and the Crown lands rendered inalienable—the whole to be effected by an Act of Resumption. Some most striking chapters on the wealth of the English people as compared with the poverty of the French peasantry conclude the discussion on finance. His views on the cowardice of the French and the courage of the English have been quoted already.

In this connection there is one feature that must always strike readers who have the advantage of knowing the history of later times. It never seems to have occurred to Fortescue that the necessity for obtaining popular consent to taxation was the one sanction that maintained the *dominium politicum et regale,* and that if he could really have succeeded in so endowing the Crown as to make it independent of asking for supply, redress of grievances would be likely to fade into the background, and the English monarchy in the hands of a strong and ambitious king would have become as purely absolute as the sovereignties with which he compares it. The full extent of that danger was not patent at the time. The Lancastrians had always ruled in a constitutional manner, and the evils of chronic disorder and the weakness of the Crown in the presence of "ouer myghtye subgettes" were so great as to overshadow every other consideration.

The King's Council.—Finally Fortescue propounds his own remedy for the "lack of governance and the undoing of the good laws," in a reform of the Privy Council. The scheme can best be given in his own words (Chap. XV. p. 146):

Wich thynges considered, and also mony oþer wech shall be shewid hereaftir, hit is thought gode, that þe kynge had a counsell chosen and estableshed in the fourme that ffolowith, or in some oþer ffourme like þerto. Ffirst, þat ther were chosen xij spirituell men, and xij temporell men, off þe wysest and best disposed men þat can be ffounde in all the parties off this lande; and that thai be sworne to counsell the kynge aftir a ffourme to be devysed ffor þer owthe. And in especiall, þat thai shall take no ffee, nor clothynge, nor no rewardes of any man, except only off þe kynge; like as þe Justices of þe kynges benche, and off þe Common place be sworne, when thai take ther offices. And þat thes xxiiij be alway counsellers, but yff þer be any defaute ffounde in hem, or þat hit lyst the kynge, be the advise off þe more parte off hem, chaunge any off hem. And þat euery yere be chosen be þe kynge iiij lordes spirituell, and iiij lordes temporall, to be ffor þat yere off þe same counsell, in like ffourme as þe said xxiiij^{ti} shall be. And that thai all haue an hed, or a cheeff to rule þe counsell, on off þe said xxiiij^{ti}, and chosen be the kynge, havynge is office at the kynges pleasur; wich may thanne be callid *Capitalis consilarius.*

With his usual minute attention to practical details he goes on to discuss the provision of the wages of the councillors, and then describes their functions as follows (p. 147):

Theis counsellors mowe contenually, at soche owres as shal be asseigned to thaym, comune and delibre vppon the materis of defeculte that ffallen to the kynge; and then vppon þe materes off þe pollycye off þe reaume; as how þe goyng owt off þe money may be restrayned, how bullyon may be brought into þe lande, how also plate, juelles, and mony late borne owt, mey be geytun ageyn; off wich right wyse men mowe some fynde the meanes. And also how þe prises off marchaundise growen in this lande mey be holde vp and encressed, and the prises off merchandyses browght into this lande abatid. How owre nauy mey be mayntened and augmented, and vppon suche oþer poyntes of police, to the grettest profyte and encresse, þat euer come to this lande. How also þe lawes mey be amendet in suche thynges as they neden reformacion in; wher through þe parlementes shall mowe do more gode in a moneth to þe amendynge off the lawe, then thai shall mowe do in a yere, yff þe amendynge þeroff be not debatyd, and be such counsell ryped to thair handes.

The whole of these proposals are discussed in great detail by Mr. Plummer in a series of notes to which the reader desirous of going into the subject in greater detail can be confidently referred. We will only mention one point here, viz. how far the proposals of Fortescue were original. Upon this there is a distinct conflict of opinion between Mr. Plummer and Stubbs. The latter says that Fortescue "sketches a system of reform, many points of which are a mere restoration of the system that was in use under the Lancastrian kings."[1]

And again—

> except the exact determination of the selection and number of the councillors, Fortescue's scheme contains nothing which had not been in principle or in practice adopted under Henry IV. and Henry V.[2]

We must agree with Mr. Plummer that in these passages the great Oxford historian has been less than just to the originality of the great Chief Justice. The essence of Fortescue's plan was not a reversion to Lancastrian practice, but an anticipation of that actually followed under the Tudors. His constant obsessions were the weakness and poverty of the Crown, and the dangers of "ouer myghtye subgettes." It was these "ouer myghtye subgettes" who for the most part composed the Lancastrian councils, and his proposal was to substitute for the council of magnates an official council "chosen on the sole ground of capacity for business." The Tudor kings not only increased the power of the Crown as he desired, but effected that increase in the way that he had foreshadowed. He is equally happy in his anticipations of the business methods of the Council and of the subjects of deliberation, and not least so in the suggestion that one of their most important functions should be the preparation of measures for the consideration of Parliament.

The Influence of Fortescue.—Recently an important paper on "The Influence of the Writings of Sir John Fortescue" was read before the Royal Historical Society by Miss C. A. J. Skeel.[3] Her general conclusions are that his influence was greatest during the sixteenth century and the constitutional struggle of the seventeenth century. At other times "the stream is doubtless narrow, but it has never ceased to flow." The reasons that contributed to that influence are summarised by Miss Skeel under the following heads: (1) His brevity. (2) The fact that knowledge of law was more generally diffused in his time than in ours. (3) His profound knowledge combined with a power of simple expression. Only a very learned man can write a good primer. (4) His varied practical experiences. (5) His clearness of expression. (6) His strong patriotism. Generally perhaps Miss Skeel is inclined to rate Fortescue's accomplishments somewhat more highly than the present writer, but as the first of English constitutional theorists he will always occupy a secure place in the history of English thought.

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[1] *Const. Hist.* Lib. ed., vol. iii. p. 261.

[2] *Op cit.* p. 263.

[3] The paper will presumably appear in the Transactions of the Society for 1916, but the writer is indebted to the courtesy of Miss Skeel for allowing him to read the MS

THE CODIFICATION OF THE COMMERCIAL LAW OF THE EMPIRE.

[*Contributed by* SIR JOHN MACDONELL, K.C.B., LL.D.]

THE construction of a Commercial Code for the Empire has often been proposed; and to-day, when much is said as to its unity, the idea has been revived. The matter was brought before the Third Congress of Chambers of Commerce of the Empire at their meeting in London in 1896 by the late Sheriff Dove-Wilson and myself; and a resolution in favour of an Imperial Commercial Code was adopted. Through the Colonial Office, the various Dominions and Colonies were communicated with on the subject. Their answers were distinctly friendly. Subsequently a meeting attended by most of the Agents-General was held. There also a favourable opinion was expressed. But it was made clear that the work of planning the enterprise and drafting all measures must be done here. And such was the intention and desire of the proposers; bills designed to fill up gaps in our mercantile law were to be prepared here, and introduced into Parliament; they were to be forwarded to the Dominion and Colonial Governments, which, if they approved of the measures, would lay them before the various Legislatures. There being no likelihood of a conflict with local interests, the subject being outside party politics, it was hoped that in this way gradually would be constructed a true Commercial Code.

Along with Sheriff Dove-Wilson, I saw Mr. Chamberlain, then Colonial Secretary. He was familiar with the idea. He approved of it, and thought it practicable. But it would be inopportune, in his view, to put the matter then before the House of Commons. Just at that time he had difficulties with certain Liberal Members. "As soon as it is known that this is a Government measure or that the Government favour it, up will jump one of them, and the measure will be lost." And so the matter was then dropped.

Since that time there have been many changes in mercantile law here and in the Colonies, some favourable, others adverse to unification. Here and there we note points of conflict between Colonial legislation; *e.g.* as to merchant shipping.[1]

Of a Civil Code for the Empire there can be no question; there exist within it profound differences in the legal systems in force. No doubt these are being effaced. Will reference to the two great bodies of jurisprudence which have prevailed in the Empire, Professor Lee, in his interesting paper on "The Civil Law and the Common Law: a World Survey," an address delivered before "the Michigan Chapter of the Order of the Coif," says: "We are at the end of the time in which it is still possible to contemplate the Civil Law and the Common Law as separate and self-contained entities. They are becoming assimilated." But even if the assimilation were complete as to contracts and torts, the differences in the law as to status are likely to remain for a considerable time. No similar obstacles bar the way to an assimilation of mercantile law; it would be only the completion of a work already far advanced. And it would, too, be only what it has often been in other countries, the accompaniment of political unification, its outward sign and symbol.

I have been asked to republish the paper which I read in 1896 before the Third Congress of Chambers of Commerce of the Empire, and it is here reprinted in its original form, with one or two slight changes.

As a member of the Society of Comparative Legislation—lately established under the auspices of Lord Herschell, Lord Russell, Sir Courtenay Ilbert, and other lawyers—I had had occasion to examine parts of the subject. I saw the need and, as I thought, the possibility of codification of this province of law. The more, however, I looked at the matter the more I was struck with the futility of the efforts of lawyers working by themselves to accomplish much in this field, and the more I was convinced that, if substantial progress were to be made, the good-will and aid of men of business, and especially of the Chambers of Commerce throughout the Empire, must be enlisted.

Two questions called for attention. First, Would the codification of the mercantile law of the British Empire be a benefit to commerce? And, secondly, Is such an undertaking practicable?

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[1] See Keith, *Imperial Unity and the Dominions*, p. 214, citing *Merchant Service Guild* v. *Commonwealth Steamship Owners*, 16 C.L.R. 664.

A full discussion of either of these questions is, of course, impossible. I intend merely to point out a few facts and considerations worthy of the notice of those who investigate these questions. I do not possess—I take leave to doubt whether any one possesses—the knowledge adequate for dealing in detail with more than a small part of this theme. The labours of a committee of lawyers of many countries would be needed to survey, map out, and report upon it. My task is solely to open up one or two paths of investigation, to mention facts lying on the threshold of the subject, and to suggest some grounds for speaking encouragingly of the enterprise.

Is Codification Feasible?—It will be well to look in the first instance at the second of these questions—Is the project feasible? Grave difficulties will present themselves to most minds. There will probably be a disposition to treat the proposal as visionary and impracticable. The impression is natural when one thinks of the vastness of the Empire, the diversity of the communities of which it is composed, and the many systems of law administered within it. The impression, nevertheless, is probably a mistaken one; not because the task is not vast and difficult, but because it has already, to a great extent, been accomplished. Unconsciously, without concert or plan, under the pressure of common needs, this country and many of our colonies have been moving in the direction of the end which I suggest. The spread of the English language and institutions, the growth of the Dominions, above all, the growth of English commerce, have diffused English mercantile law over a large part of the new world. It will be found that what is chiefly required is not so much the creation of a totally new structure as a survey of the entire field, the utilising of materials already existing, the filling up of crevices and gaps, the removal of certain obstacles, a clear idea of what is aimed at, and, above all, continuity in pursuing it.

In using the phrase "English mercantile law," my meaning must not be misunderstood. Many of the rules and principles of that law have a remote and foreign origin.[1] They can be traced to the Roman law and the Rhodian law. They are found in mediæval collections of sea laws. They are borrowed from writers of the sixteenth or seventeenth century, such as Straccha and

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[1] See as to the origin of Mercantile Law, Mr. Mitchell's *Essay on the Early History of the Law Merchant* (1904).

Marquard, who systematised the usages of the Genoese, Venetian, and Florentine merchants. Some of the rules come from the Ordinances of Louis XIV. All that is implied in the above phrase is that the most developed body of mercantile law, the richest storehouse of illustrations, is to be found in English decisions and statutes.

Mercantile law is a vague term, hard to define with precision. It will be noted that in the majority of modern mercantile codes there is no attempt at an accurate definition; the framers of them have been content to mention the chief branches of it. We shall get, however, a clear idea of the subject if we have before us the outline of some of the chief modern mercantile codes; most of them, by the way, modelled, more or less closely, on the French *Code de Commerce* of 1807.

COMMERCIAL CODE OF THE NETHERLANDS	COMMERCIAL CODE OF ITALY.	ARGENTINE COMMERCIAL CODE.
BOOK I.—TRADE IN GENERAL.	BOOK I.—TRADE IN GENERAL.	BOOK I.
	Title.	Title.
1 Traders and commercial Acts. 2 Traders' books. 3 Commercial partnerships. 4 Commercial exchanges, brokers and bankers. 5 Commission agents and forwarding agents, carriers, bargemen navigating inland rivers and canals. 6 Bills of exchange. 7 Engagements to pay or promissory notes, and other paper payable to bearer. 8 Of reclaiming or revindication in matters of commerce (lien for unpaid purchase money, etc.) 9 Insurance in general. 10 Insurance against fire risks, and life insurance.	1 General regulations. 2 Commercial Acts. 3 Traders. 4 Traders' books. 5 Agents. 6 Commercial obligations in general. 7 Sale. 8 Riporto.[1] 9 Partnership and companies. 10 Bills of exchange and cheques. 11 Contract of current account. 12 Commercial agency and commission. 13 Contract of carriage. 14 Contract of insurance. 15 Pledge. 16 Warehousing of merchandise, etc.	1 Traders. 2 Obligations common to all persons carrying on business as traders 3 Bourses and markets. 4 Commercial agents.
BOOK II.—THE RIGHTS AND OBLIGATIONS RESULTING FROM NAVIGATION.	BOOK II.—THE RIGHTS AND OBLIGATIONS RESULTING FROM NAVIGATION.	BOOK II.—COMMERCIAL CONTRACTS.
	Title.	Title.
1 Seagoing vessels. 2 Owers, co-owners, and managing owners.	1 Seagoing vessels and their owners. 2 The master.	1 Commercial contracts and commercial obligations in general.

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[1] See Art. 73 for definition of *contratto di riporto*.

COMMERCIAL CODE OF THE NETHERLANDS.

3 The master.
4 The hiring of ships' officers and seamen and their rights and duties.
5 The affreighting and chartering of ships, charter parties and bills of lading, and passengers.
6 Damage by running down, collision or fouling.
7 Shipwreck, stranding, and goods found floating at sea.
8 Bottomry.
9 Of insurance against the perils of the sea.
10 Of insurance against the risks of conveyance by land and by river and inland canals.
11 Averages (general and particular).
12 Of the becoming void of contracts in maritime commerce.
13 Of ships and vessels navigating on rivers and inland canals.

Book III.—Bankruptcy.

COMMERCIAL CODE OF ITALY.

3 The hiring of the crew and their wages.
4 The contract of affreightment.
5 Bottomry, etc.
6 Marine insurance.
7 Average and contributions.
8 Of damages by collision.
9 Secured creditors.

Book III.—Bankruptcy.

Book IV.

Title.
1 Commercial actions.
2 Prescriptions.

ARGENTINE COMMERCIAL CODE.

2 Agency—mandate and commission.
3 Companies and partnerships.
4 Sale.
5 Guarantees and letters of credit.
6 Insurance in general.
7 Loans and interest.
8 Deposit.
9 Pledge.
10 Bills of exchange.
11 Other commercial paper to bearer.
12 Current accounts.
13 Cheques.
14 Discharge by prescription.

Book III.—Rights and Obligations resulting from Navigation.

Title.
1 Ships.
2 Owners, co-owners, etc.
3 Masters.
4 Pilots.
5 Supercargoes.
6 Hiring and wages of officers and seamen.
7 Contract of affreightment.
8 Bottomry bonds, etc.
9 Marine insurance.
10 Insurance against risks of conveyance by land, etc.
11 Collisions.
12 Deviation on account of distress.
13 Shipwrecks.
14 Average.
15 Marine hypothecation.
16 Marine lien.

Book IV.—Bankruptcy.

Synopsis of the Codes.—Summarising the contents of these codes, most of the chapters fall into the following groups :—

(*a*) Partnership.
(*b*) Companies.
(*c*) Agency (including authority of factors).
(*d*) Sale.
(*e*) Lien.
(*f*) Contract of guarantee.
(*g*) Insurance (fire, life, marine).
(*h*) Merchant shipping.
(*i*) Contracts with carriers by land.
(*j*) Contracts of affreightment.
(*k*) Bills of exchange and negotiable instruments.
(*l*) Bankruptcy.

What has been done already in regard to these subjects in England ? Much more than is generally known. There are the Partnership Act of 1890; the Companies' Consolidation Act, 1908; the Factors Act, 1889; the Sale of Goods Act, 1893; the Marine Insurance Act, 1906; the Merchant Shipping Act, 1894, a measure to which there is, so far as I know, nothing corresponding in any foreign code, a minute comprehensive Act much longer than some modern mercantile codes; the various Railway Regulations Acts and the Carriers Act; the Bills of Exchange Act, 1882; the Bankruptcy and Deeds of Arrangement Acts, 1914.

The chief gaps are in (*c*), (*f*) and (*j*)—not the largest or most intractable parts of the subject. Notwithstanding these deficiencies, we possess large portions—speaking roughly, fully three-fourths—of a mercantile code constructed on a much more minute scale than any of the codes above mentioned. The Merchant Shipping Act, 1894, the longest statute, it is said, ever passed by Parliament, consists of 748 sections and twenty-two schedules. In the entire Argentine Mercantile Code are 1547 articles, of which only a few relate to the subjects dealt with in the Merchant Shipping Act. When collected the English statutes relating to mercantile affairs will be found to be much longer than any of the codes above mentioned.

Comprehensiveness of English Commercial Law.—Length is, of course, no merit ; but completeness, definiteness and precision are cardinal virtues ; and my point is that several of the foreign codes, with all their good qualities, are somewhat sketchy performances—in the view of an English draughtsman, mere outlines or heads of a subject—and that they leave to the individual judge or commentator a latitude not tolerated here. A further point is that our mercantile law contains a great variety of precedents and illustrations, not to be found elsewhere. A friend of mine, a member of an international court, in which prevailed a little jealousy of English institutions, had often occasion to prepare the judgment of the court. When the matter related to mercantile law, he found, as might be expected, English authorities and writers most instructive and generally in point. By them he was in fact guided to a decision ; but in tenderness to the feelings of his colleagues, he then sought, sometimes in vain, for some articles in the *Code de Commerce*, which, more or less, related to the question, cited the article most in point, and thus justified to his colleagues' satisfaction an opinion at which he had arrived to his own satisfaction on other grounds. Even in foreign works written by adversaries of English law, it is curious to note how often they are compelled to seek for illustration and assistance in the immense storehouse of decisions on mercantile law in the jurisprudence of England and the United States.

Adoption of English Law throughout the Empire.—Such in outline is the position of English mercantile law. What is the state of things in the Dominions and British possessions ?

They may be divided into four groups :—

1. British India with a population of about 315,000,000. There the Contract Code, applicable to most mercantile transactions, is in force. It is substantially English law in the form of a code. The Bill of Exchange Act in force there substantially reproduces English law, and the Companies Act of 1913 follows the English Act.

2. A large group of possessions with a population of over 12,000,000, including the Commonwealth of Australia, New Zealand, the greater portion of the Dominion of Canada, in which English law, except so far as it has been modified by local legislation, is the law. Throughout the Dominions English statutes affecting mercantile law have been adopted, or in part reproduced. Many such measures as the Companies Acts, the Bills of Exchange Act, the Factors Act, the Bankruptcy Act, find their place, with more or less change, in the local statute books. Common needs, the same ideas as to what is right and practicable, the same methods

of doing business, have made mercantile communities adopt, without concert or deliberation, much the same measures.

3. There is a third group of possessions with a population of about 2,000,000 in which French law in some form may be described as the common law; that is, French law as it appears in the Code Civil or French law as it was before the Code. They consist of Quebec, the Mauritius, and the island of St. Lucia.[1] It will be found, I have reason to believe, that on a close examination of the legislation of these colonies, they, too, have undergone the influence of English mercantile law.

4. There is a fourth group including the Union of South Africa, Ceylon, and British Guiana, in which Roman-Dutch law is the common law. Here, too, however, if I am not misinformed, the bulk of the mercantile law is closely akin to our own. The same text-books and authorities are cited as in our courts, and a charter party or bill of lading will be construed in the same manner as it is construed in the Royal Courts. To make good this statement, let me cite two sections from a statute of Cape Colony.

> 1. In all questions relating to maritime and shipping law in respect of which the Supreme Court has concurrent jurisdiction with the Vice-Admiralty Court, the law of this colony shall hereafter be the same as the law of England, so far as the law of England shall not be repugnant to, or inconsistent with, any ordinance, Act of Parliament, or other statute having the force of law in this colony.
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> 2. In every suit, action or cause having reference to questions of fire, life and marine insurance, stoppage in transitu, or bills of lading, which shall henceforth be brought in the Supreme Court or in any other competent court of this colony, the law administered by the High Court of Justice in England for the time being, so far as the same is not repugnant to, or in conflict with, any ordinance, Act of Parliament, or other statute having the force of law in this colony, shall be the law to be administered by the said Supreme Court or other competent court (1879, No. 8).

Influence of English Law in United States.—As every one knows, the basis of the mercantile law throughout the United States is much the same as ours. The same text writers and authorities are cited as in our courts. Such writers as Story, Parsons, Phillips, have as much authority here as in America. It is true that many minute differences exist, and that there is a deplorable lack of uniformity in the legislation of the individual States. But there is a strong feeling in favour of the removal of such differences. Much valuable work has been done by the National Conference of Commissioners on Uniform State Laws, especially in respect to commercial law, of which an admirable account is given in this number of the Journal by a former President of the commission, Mr. Walter G. Smith.[1]

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[1] Burge's *Commentaries on Colonial and Foreign Laws*, new ed., vol. i. p. 255.

Population Governed by English Mercantile Law.—What is the total number of people governing their transactions by English mercantile law, in the sense in which the term is here used, is not easy to say. Herr Bochhard, compiler of a collection of the chief mercantile laws of the world, made an estimate in 1871 of the number of people subject to the Code de Commerce of 1807, to the German Handels-gesetzbuch, and to the English mercantile law. His figures were the following : 233,700,000 subject to French law, 252,400,000 to the English, and 32,000,000 to the German. These figures were not, even in 1871, more than rough approximations or surmises as to the extent to which English, French or German law relating to bills of exchange had been more or less adopted. Since the time when Herr Bochhard's estimate was made the situation has greatly changed, in some, but not in all respects, to the disadvantage of English law. It is not too much to say that, including India, the Dominions, the colonies not possessing responsible government and the United States, the mercantile transactions of about 300,000,000 of the human race are regulated by laws the same as, or akin to, those of England. Mercantile law has sometimes been loosely called a part of the *jus gentium*. It is the *jus gentium* in another sense than that once recognised by a few communities grouped round the Mediterranean. Gibbon puts the population of the Roman Empire in the time of Claudius at 120,000,000—not much more than a third perhaps of the population which recognises English mercantile law.

Reasons in Favour of Codification.—The length of time which was occupied by Germany, Japan and Switzerland in the preparation of a Civil Code may seem discouraging. But in regard to mercantile law no difficulties need be feared comparable to those encountered by the framers of a Civil Code, who stir fundamental questions affecting property, inheritance, the family, the relations of labour and capital, husband and wife. On the subject of commercial law exist none of the strong local feelings which make uniformity out of the question, say, in regard to constitutional Legislation; none or few of the local peculiarites which bring about so much diversity in regard to land and mining laws; no deep-seated differences of principles which make one despair of introducing order into the chaos of the marriage laws of the British Empire. Whether a local legislature has taken a trend towards Socialism or not, it will probably think the same about Marine Insurance or General Average.

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[1] See *supra*, p. 154.

These are some encouraging circumstances; and they are not all. Communities may start with a common body of law, but unless it is administered by the same courts, or unless there is a court of review to correct and remove sectional differences, they are sure to appear.[1] Now in the Judicial Committee of the Privy Council there is a court of appeal for the Empire; a court to which come from time to time questions of mercantile law, and where they are solved in the same manner, no matter where they have originated. "Greenwich time" and the law administered by the tribunal sitting in Downing Street are recognised over an almost equally large area.

Disadvantages of Codification.—So far, the encouraging circumstances, which are neither few nor unimportant. Now as to the disadvantages and obstacles, of which it would be folly to make light.

The first of these is the fact that English mercantile law—and I include therein the jurisprudence of many of our colonies—has left unsolved questions of supreme moment to men of business; questions which the framers of a code must deal with and in some manner answer; questions which our courts, with their usual disposition to decide as little as possible, have shown great ingenuity in evading. To take an illustration from a matter of great consequence in modern business. Are there negotiable securities other than bills of exchange and promissory notes? If there are any such, what are they? Can the list of such securities be indefinitely increased, or has the Law Merchant finally determined their number? If they can be increased, what will suffice to make them negotiable? Must there be a statute, or will usage be enough? If usage, what usage? The usage of the Stock Exchange merely? Or must there be the usage of European markets generally? Is the opinion expressed on the subject in *Crouch* v. *Crédit Foncier* correct? Or is the contrary opinion expressed in some of the judgments in *Goodwin* v. *Robarts* the true one? It is curious that the exact juridical nature of securities which pass from hand to hand to the extent of many millions should be uncertain. But so it is. [This question may now be said to be determined by *Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q.B. 658, which is in accordance with *Goodwin* v. *Robarts*.]

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[1] Upon the need which has been felt for uniformity of decisions in the United States, see quotation from the *Harvard Law Review*, *infra*, p. 366.

A second obstacle or drawback is this: there are many questions as to which English law gives an answer which other communities may not be prepared to accept. To refer to one matter of the first importance, many modern codes create a *Handelsregister*, in which are inscribed matters which it is deemed right people dealing with merchants and traders should know; not merely matters similar to those entered in the register of joint stock companies at Somerset House, and in the register of trade marks, but many other details, *e.g.* the names of partners and the nature and extent of the authority of agents. Some modern codes strike one as requiring needless minuteness and publicity as to matters which are of little moment in business. But there may be a just *via media* between our law, which enables a man to keep up false appearances, trade under the name of a firm without there being any readily accessible means of knowing whether he has partners, and mercantile codes which insist upon minute entries as to traders' capital, mortgages, the names of their agents and the extent of their authority.

Obligation on Merchants to keep Books of Account.—One great difference exists in regard to the books of men of business. In several systems of law, there is an obligation on a merchant to keep proper books of account, and failure to do so is severely punished. For example, the Dutch Mercantile Code (Book I. c. 2, Article 6) says:

> Every trader is bound to keep a journal, in which must be entered day by day, in order of date and without interlining, blank spaces, or marginal notes, his claims or assets and debts, his commercial undertakings,

drafts acceptances, or endorsements of bills of exchange and other commercial paper, his engagements, and generally all which he receives and pays without exception—all independently of such other books as are customary in trade, though not explicitly required by law.

7. He is bound to preserve the letters he receives and to keep a book containing copies of those he despatches.

8. He is bound annually to draw up within the first six months of the year, and in a separate register to be kept for that purpose, a balance-sheet and statement of the position of his affairs, and to affix his signature thereto.

9. Traders are bound to preserve their books for a period of thirty years.

There is a partial recognition of this principle in the Bankruptcy Act, s. 2, which requires the court to refuse, suspend, or qualify the discharge of a bankrupt who has omitted to keep proper books of account. Some foreign codes give to entries in a merchant's books importance which English rules of evidence deny them. At common law the theory was that a merchant might refer to entries in his books to refresh his memory and entries in them by deceased persons against their interest were receivable in evidence. The old view of English authorities was tersely expressed by a well-known text writer, who, referring to the rule recognised in other systems, declared that "it is a violation of the rule, alike of law and common sense, that a man shall not be allowed to manufacture evidence for himself."[1] To-day in England there is some modification of the principle of the Common Law. For certain purposes such entries are *prima facie* evidence.[2] But we are still far from giving to regularly kept books the weight assigned to them in some systems of law.

Special Commercial Court Procedure.—A third point of difference may be referred to. In England we have no special tribunal, no special procedure, for commercial cases. They are dealt with by judges in the ordinary way. True, there is a commercial Court, doing, it will be admitted, excellent work. But it has again and again been explained by the highest authorities that the so-called Commercial Court is subject to the ordinary rules of procedure and evidence, and that Commercial cases must be tried in the same manner as other cases. It is not so in France and Belgium, where exist tribunals of commerce; it was not so in Holland, Spain and Italy, where tribunals of commerce modelled on those of France existed, but have been abandoned. In regard to mercantile instruments, such as bills of exchange, we have no "summary diligence," to use a Scotch law phrase, no special means of bringing to book quickly and sharply a person who fails to meet his acceptance. The holder of an unpaid bill of exchange is treated too much as any other creditor suing on a liquidated claim. Whether in these matters we are right and others wrong is a large question, not to be decided here; but we must not be sure that other countries will take it for granted that ours is the right course.

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[1] Best on Evidence, s. 503.

[2] See Taylor on Evidence, s. 711, and Rules of Supreme Court O. XXXIII. r. 3.

I might multiply examples of points of difference. They would be found in abundance in the maritime law and in the contract of affreightment. There are differences, for the most part minute and of no great importance, between our law and that of other countries in regard to marine insurance and general average. We attach, for example, an efficacy to valued policies (virtually declining to allow them to be opened, however great may be the overvaluation, in the absence of fraud) which such policies do not universally receive and perhaps do not merit.[1]

Differences in Bills of Lading.—Here and in some other countries there has been an agitation as to the form of bills of lading. Some have said—and it is the opinion which still holds the ground in this country—"Leave the matter to private contract; the shipper need not put his goods on board if he dislikes the form of the bill of lading offered to him; and the risks which the shipowner throws off, the owner of the goods can cover by insurance." Others have said: "This is mere theory; the great shipping lines have as much a practical monopoly as the great railway companies; and there is equal need of preventing both from imposing on their customers unreasonable terms. It is, too, contrary to public policy to recognise the power of contracting out of or impairing the obligation of seaworthiness." A victory has been gained by the adherents of the latter view in the United States by the Harter Act; the victory is slight, because, apparently, much of what is given in the two first sections of the Act is taken away in the third section. The controversy continues, and one must not assume that the final decision will be in accordance with that which has hitherto been English law.

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[1] Arnold on Insurance, 9th ed., p. 341.

Differences in Bankruptcy Law.—The difficulties in the way of codification would be very inadequately presented if no reference were made to the profound division of opinion and practice on the subject of bankruptcy. In many of our Colonies exist Acts modelled upon the present English Act, or some of its predecessors. In others, if I am rightly informed, there is a more primitive type of bankruptcy or insolvency law, based on *cessio bonorum*. There is, as you are aware, no Federal bankruptcy law in America; that which formerly existed has been repealed; and the movement in favour of a general bankruptcy law, though not stopped, seems to make little progress. The differences between English law and the law of foreign countries as to the classes of persons subject to bankruptcy, its effect on the property of the bankrupt, the methods of administration and preservation of estates, privileged creditors, compositions, and orders of discharge, are great. In regard to the preliminary question, "Who may be made bankrupt?" we are told that "a line of cleavage may be drawn between the countries of the Latin and those of the Germanic and Anglo-Saxon races, the former limiting its application to commercial debtors exclusively, the latter extending it to all citizens."[1] We are a long way probably farther than we once were—from "unity of bankruptcy," which is the ideal to be attained; and I have been told that from time to time—for example, during the banking and financial disasters in Australia—the discord and confusion in regard to bankruptcy law proved highly inconvenient to men of business.

No doubt many other questions, impossible to be foreseen by any one, would be raised and debated before a complete mercantile code likely to win general acceptance could be passed. The experience of the framers of the German Civil Code shows that however desirous in the work of codification you may be to touch nothing fundamental, you cannot help stirring questions of principle. In several countries—Germany for example—there is a disposition to control by legislation speculative or time bargains and contracts as to "differences" or in "futures." The English legislation contained in the Gaming and Wagering Acts is not so satisfactory that we could confidently expect other countries to adopt it.

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[1] *Bankruptcy: A Study in Comparative Legislation*, by S. W. Dunscomb.

Private International Law.—A large proportion of mercantile transactions are between people of different countries, and a mercantile code framed without reference to private international law could not be satisfactory. Examined from this point of view, English law will be found to be in some respects in a state of isolation; and it may be necessary to remove or modify two or three deeply-rooted ideas. This part of the subject has been studied by the Institut de Droit International, and the tendency of the conclusions arrived at is to substitute, as a test of personal capacity in mercantile contracts, etc., for domicile—the test which finds favour in England and the United States—that of nationality.

Influence of a Code.—What will be the ultimate decision on the questions above mentioned, or whether there will ever be complete uniformity in this matter, it is useless trying to conjecture. This, however, is pretty certain—any system of law which is in the form of a code will exercise far greater influence than if it were in the shapeless, undigested state in which are still some parts of ours.[1] A superficial examination of modern mercantile codes will satisfy one that between them there is a strong likeness, and that their features are not those of English law, but of the French and German codes. This was to be expected. It is a principle of jurisprudence that systems of law perfect or developed in form necessarily affect and shape other systems less developed brought into proximity to them; a principle illustrated whenever, in the past, Roman law came in contact with laws not reduced to shape by scientific jurists; a principle verified in the profound influence exercised by the Canon law on the criminal law of the Middle Ages; a truth now verified in India, where the Anglo-Indian codes and English legal doctrines are leavening the uncodified Hindoo and Mahommedan law.[2]

Men's readiness to imitate, their reluctance to strike out new lines, indolence and prudence alike, make the framers of new codes turn to those which, like the French Code de Commerce, have stood the test of time. The law which is superior in point of form need not be the superior in substance; that which is uncodified may contain sound principles; they have not a fair chance in competition with principles and rules made portable and intelligible by a code.

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[1] Institut de Droit International, Annuaire, x. p. 80; Dicey, *Conflict of Laws*, 2nd ed., p. 106.

[2] See, for example, the effect of the English law of trusts on Hindoo law (Agnew, *The Law of Trusts in British India—Tagore Law Lectures*, p. 10, etc.).

Procedure towards Codification.—How the end in view is to be attained it is not for me to say. Probably, if I might hazard a surmise, the undertaking will be best accomplished by doing, more systematically and with larger knowledge, what has been done in the past—borrowing freely what is good in the legislation of the mother country or Colonies; taking note of the chief measures passed within the Empire likely to affect trade and commerce; and aiming steadily at unity. A code is not, any more than a building or a machine, constructed without some directing mind. A Committee containing jurists of eminence in this country and the Dominions is essential if the work is to be wisely planned. The co-operation of the Colonial Office is also essential; and the aid of such a Society as the Society of Comparative Legislation would be useful. But the impulse to carry the work through must come from the Chambers of Commerce of the Empire.

Just at present it is the fashion to speak lightly and disparagingly of the value of codes. It is sometimes said that they are of little practical utility; that they in no way release the man of business from thraldom to the lawyer; that they deprive law of its elasticity, and prevent it from being shaped to meet new circumstances not foreseen by the Legislature; and that the need for codification is not what it was. Perhaps law reformers in the past generation overrated its value. Undoubtedly, some modern lawyers greatly underrate it. This question might indeed be passed over as one definitely settled. In all countries legislation is active; in all the domain left for judicial discretion is being contracted; in most of them consolidation measures are being passed as absolute practical necessities in view of the growing volume of statute law; and the question no longer is, between Code or no Code, the limitations of the former and the elasticity of the latter, but between Codes, good or bad, between a few measures so wisely constructed as to gain wide acceptance and a multitude of Acts passed without reference to each other. A code, it is said, is at best only a map, and a map which cannot be on such a scale as to contain everything of which you are in search. This is a strange objection. As well might you term the Ordnance map worthless because it does not supersede the Postal Directory. A map even on the largest scale will not enable you to find your own or your neighbour's house. But it tells the position of great landmarks; it shows your bearings; it prevents you being hopelessly lost or futilely wandering; it renders services akin to those rendered by a code to the people who live under it. They acquire—and those best acquainted with France and Germany will bear me out in this—a knowledge of their duties and rights, a sound legal instinct, to which few cultivated Englishmen could make pretence. The Code Civil does for the mass of French people in their legal relations very much what the metric system does for them in matters of calculation. The assumption that codification does not diminish litigation is open to question; it will not be admitted by those who know that since the passing of the Bills of Exchange Act, the cases before the Courts raising nice points as to the rights of parties to negotiable instruments have considerably diminished.

Advantages of Codification.—But two other reasons of greater weight appear to me to be decisive. Codification means the sifting out and expulsion of bad law, the riddance of decisions which society has outgrown, but which judges must enforce. Nonsensical, mischievous principles may be suffered to remain on the statute book or in some little explored corner of the great body of case law; the codifier hunts them out; and they cannot be solemnly re-enacted in the face of the world. The process of codification is a process of improvement in the substance as well as form of the law; and it is not to be doubted that mercantile law would emerge from the process better than it now is. To illustrate my meaning by reference to a part of mercantile law still in a shapeless condition—the law of guarantee. A is in debt to B, or is under a contract to deliver goods to B; C guarantees the payment of the debt or the performance of the contract; B "gives time" to A, as the phrase is, *i.e.* binds himself to allow an extension of time—it may be for a week or two. The step may be a prudent one on the part of B; the short breathing space may help A to put himself in funds, meet his liabilities, and so relieve C. But under the law as it stands there can be no question as to whether, if at all and, if in any degree how much, C the guarantor has been injured; he is at once released. It may well be doubted whether such a rule of law would be deliberately re-enacted. At common law there was a similar unreasonable rule with respect to the discharge of a drawer of a cheque not presented within a reasonable time. The anomaly was seen and removed when the law of negotiable instruments was codified.[1]

A second reason may have more weight with the delegates to this Congress. How is it that wherever among modern communities there has been a desire to draw closer together, there has been a desire also for a code of laws? Why has it so often been regarded as the seal and symbol of unity, the aptest expression of common feelings? Among the earliest labours of the Parliaments of united Germany and Italy was a series of codes. A true instinct guided them in this. They knew that not even a common tongue or literature or the same fiscal system is a tie so strong and lasting as a common system of laws. Why not do at least on a small scale what they have done on a large? Throughout the Empire would be a new sense of unity if one chapter at least in the statute books of all the many Legislatures under the Crown were in substance the same—if throughout the Empire there was one flag, and, as to mercantile affairs, one law. A great opportunity exists—it may soon depart. Even partial success would be valuable. No enterprise worthier of the energy and ability of the present Colonial Secretary can be conceived. No work which he could accomplish in his office would be more enduring. How far off seem the victories, how quickly passed the conquests of Napoleon, while the codes that bear his name still win fresh victories and still make conquests likely to last; in France these codes stable amid unstable institutions; in other lands, adopted or imitated by people that hate his memory! The example might incite the most ambitious and encourage the most despondent.

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[1] See Bills of Exchange Act, 1882, s. 74.

THE CHILDREN'S RIGHTS LAWS AND MATERNITY INSURANCE IN NORWAY.

[*Contributed by* J. CASTBERG, ESQ., *President of the Odelsting.*[1]]

SOME people were of opinion that social reforms were to be put off during the world-crisis produced by the war. The Norwegian legislative bodies acted otherwise. Out of 123 members of the Storthing of 1912, about 100 were elected on a more or less radical reform policy. The composition of the Government was influenced accordingly. It began its work in 1913 in this direction by founding a Social Department to which the whole National Health Board was attached. This department laid before the Storthing during the first year a series of important bills for social reforms. Their fate was still undecided in the summer of 1914 when war broke out, and it was not until 1915 that the measures, wholly or in part, were passed. Amongst the laws, the Children's Rights Laws and the Maternity Insurance are of the most vital importance and the most far-reaching in their consequences. They aim at a greater recognition and respect for the sanctity of motherhood and thereby for the coming generation.

The effect of legislation by men has in all countries made the women a subject class not only politically, but still more ethically and socially, in family and in marriage, and in the relation between the parents themselves and towards their children. Motherhood itself has not been protected, safeguarded, or venerated as the highest and most wonderful expression of human creative power. On its forehead ought to be inscribed : Freedom with responsibility.

The Effect of Women's Movement.—The movement for women's emancipation of our time is the revolt of women against this subjection ; in their heart of hearts it is a demand for freedom, as most revolutions are. The first demand of the women's movement was a demand for equality, because men dominate in the relation between the sexes. But the essence of their demand is a longing for freedom created by suffering, resignation, and subjection. It began as a fight for political and economic equality, the political vote and eligibility for membership of the legislative body, economic independence, equal admission to all public offices, etc. The movement is now pressing forward to its true goal, the right and freedom of woman as a woman, the right of her sex, the elevation of motherhood to the honour and respect which is due to it, and the social care of mother and child. This is the natural and necessary development of the political side of the woman movement. Their lines do not diverge, still less are they opposed to each other. Women must have political rights to obtain the power of organisation and economic independence, the right to work, of a kind suited to women's nature, and equal pay for equal work. Economic independence is in modern society a necessary condition for the freedom of women, for the rights of motherhood and for the complete protection due from society to the mother and her child. It is natural, therefore, that this new phase of the women's movement should have appeared in Norway, where women already for some years have had the same political rights as men.

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[1] The Upper House of the Storthing.

The Principle of the Children's Rights Laws.—The Norwegian Children's Rights Laws are a result of this development of the woman's movement. This is the new principle, which is dimly discerned behind the chief provisions of the law. It was this principle also which aroused the most violent opposition and at the same time received the most sympathetic support. On one side the old domination of man with his contempt for "natural" motherhood; on the other side the respect for and protection of motherhood for its own sake. This principle was embodied in the law by the establishment of the equal responsibility and duty of the father and the mother towards the child, the equal right of the child towards its father and mother, the duty of the father to take care of the child's mother before, during, and after her confinement, the right of the child to be brought up according to its father's social position, if the father should be the more well-to-do of the parents, and last but not least, the duty of society to try to establish the paternity in all cases, this being an absolute contrast to the Code Napoléon : *La recherche de la paternité est interdite.*

This principle was also expressed in a simultaneous alteration of the criminal law, which makes it penal for a man to neglect a woman who is with child by him, or to leave her in a helpless or needy position.

The Six Laws.—The Norwegian Children's Rights Laws of April 10, 1915, are six:

1. The principal law deals with children whose parents have not entered into marriage with each other.
2. The law about parents and legitimate children.
3. Alteration of the divorce law.
4. Alteration of the law about the economic relations of married people.
5. Alteration of the inheritance law.
6. The law about the care of children.

The Status of Illegitimate Children.—The first paragraph of the fundamental law contains the principle inspiring the whole legislation. It is the following:

A child whose parents have not entered into marriage with each other has—subject to exceptions otherwise established by legislation—the same legal position in regard to its father as to its mother.

The child has the right to the family name of its father and to the family name of its mother. If the father's family name is not taken at the birth of the child, a later adoption of the name must be carried out in accordance with the law in force in regard to change of names.

In immediate connection with this law are:

(*a*) The enactment that whichever of the parents has the care of the child shall provide for it as if it were legitimately born, and that it shall be brought up and educated according to the conditions of whichever of its parents is the more well-to-do; and

(*b*) The inheritance law, according to which the child also has the right to inherit from its father and his relatives and these have also the right to leave property to the child, as if it were born in marriage.

The Objects of the Law.—In discussing the purposes of the bill the Social Department says that Norwegian legislation is still based on the outrageous and unnatural fiction that an illegitimate child has only a mother—that legally it has no father. This applies even if the identity of the father is beyond any doubt. The law also in this case deprives the child of the right of a child to have a father, who is practically only placed in an economic relation to his child. The child is excluded from his family, from his name, and from his inheritance. The father is in regard to his child a stranger, the child is repudiated and disowned. This is not based on moral reasons, nor is it enacted out of regard to marriage, as the illegitimate child has all the claims of a child to its mother. Legislation has placed all the responsibility and care for the child on the mother. She must work for the child and bring it up, the child has the legal right to her family name, and the child inherits from her and all her relatives in the same way as a child born in marriage.

The disproportion between the responsibility placed upon the man and the woman is the more outrageous as it is due to legislation in which women have had no share, legislation exclusively by men. It is not only a wrong done to the mother and the child, but a demoralising institution, as it frees the man from his natural responsibility and thereby tempts him to recklessness in giving life to a human being instead of regarding it as one of the most serious responsibilities in a man's life. It breaks down man's respect for women, brutalises his view of the relation between parents, and between parents and children, and in this way repudiates what is the ethical basis of marriage.

At the same time this legalised irresponsibility of the man, his legally protected anonymity, exposes the child to want and disgrace, and contributes to the feeling of these children of being singled out and disowned, and causes so many of them to go down in the struggle for life.

The increasing social sense of justice, and especially the citizenship of women with rights and duties towards society, has little by little raised a demand for an alteration in this unfair distribution of the responsibility of man and woman. In most countries one can see a strong movement in the direction of improving the legal position of the child born out of marriage and of increasing the duties of the father. Moreover, in other countries besides Norway, the view is now being pressed forward that the present arrangement is a repudiation of the demand for civil equality and for the equal rights and duties of man and of woman.

The new legislation attempts to make up for the wrong towards mother and child imposed by the previous law. It seeks to remove the injustice of visiting society's disapproval of the illegitimate relation between the parents on the child. It aims at establishing the paternity and increasing the feeling of responsibility of the father towards mother and child. It aims at crushing the system of concealment and lies in which paternity now is allowed to be shrouded, and which is in itself an offence to wifehood and to marriage. It enforces the duty of the man to take care of the woman who is with child by him. It is based on the fundamental principle of strengthening society by protecting motherhood and by allowing the child to be provided for and have its rights both to its father and to its mother.

The Right to Inherit.—As to the special question of the full right to inherit both from the father and from the father's relatives, this demand has already taken hold of the people's sense of justice. This was shown in 1904, when the Government laid this question before all the county councils both in the country and in the towns. Most of them recommended that the rights of inheritance should be given. This was shown still more distinctly by the attitude to this question of the different parties in the Storthing. The contest was not fought on the question for or against the right of inheritance of these unhappy children, but only as to what extent it should be applied. The Conservatives and a minority of the Liberals joined the majority within the Cabinet who proposed that right of inheritance should be given—

(1) In every case in which the father recognised the paternity;

(2) If the paternity was established by the Court, but such decision could only be pronounced if the woman became pregnant under a promise of marriage, or if the man and woman were engaged to be married, or if it took place under circumstances which implied a criminal responsibility on the part of the father according to certain provisions in the criminal law.

The Social Department supported by the minority of the Cabinet proposed the right of inheritance in all cases where the paternity was established either by the recognition of his paternity by the father or by the Court. This proposal was adopted by the Odelsting by 49 votes against 37 and in the Lagting by 20 votes against 11.

The choice between these proposals could not be very doubtful. According to the proposal of the Cabinet majority the father's recognition of paternity was sufficient to justify the right of inheritance. The principle of the reform was thus acknowledged. The difference arose on the question of proof. Moreover, this proposal accepted a decision by a Court of paternity, but only when the Court at the same time found certain circumstances established which had no significance in regard to the proof of paternity.

Such limitation in the law would become a temptation to an irresponsible father to deny the paternity and avoid by this means being considered as the father. It would establish a reward for a mendacious denial. The liar in this case would not get his denial tested by the Court after the calling of evidence and investigation. The proposal contained no fundamental advantage in any direction, but important practical difficulties.

What was the reason of the success of this radical alteration of the inheritance law?

Both the department's proposal and its advocates in the Storthing emphasised the point that the chief end in sight was not simply that the child should obtain the economic advantage which this right of inheritance might sometimes secure for it—in most cases the inheritance would be nothing or next to nothing. It was a demand for justice, which they wanted to grant—a demand that the child should have an equal claim before the law to its father and to its mother, subject only to the exceptions bound up "with natural causes, and with the actual state of conditions, that the parents do not live together." These exceptions are on one side the mother's preferential right to have the child with her, on the other the legitimate children's allodial right (odelsret) to the family's land property, and the preferential right of the eldest legitimate child to take possession of his father's estate or farm on a cheap valuation (aasœdesret).

Another point was strongly put forward by the promoters of the bill. The right of inheritance would in many cases make it difficult for the father to conceal the existence of the child. They said in the debate: the father will from the first know that his child will come forward at the moment of his death and claim its inheritance. It is right that he should have prepared his family for this eventuality, that he should not be enabled to conceal the existence of his own child from those nearest to him. It was the cowardice, the untruthfulness, and the irresponsibility of such concealment which the bill intended to demolish.

Several members objected to the bill on the ground that the wife might be exposed to the injustice of the money which she had brought to the marriage being used to pay the claim of inheritance of her husband's illegitimate children.

This objection has, however, a wider bearing than the illegitimate child's right to inherit from its father. The argument has the same force when applied to the case of inheritance from the mother. And the same objection also applies in the case of the legitimate children of one of the partners to the marriage by a previous marriage. To remove this injustice to some extent an alteration was made in the law affecting the economic relation of husband and wife. The following addition was made: one partner to the marriage has the right to demand that their common property be divided if the other, when entering marriage, had, without the knowledge of the first, a child born out of wedlock, which is entitled by the legislation in force to inherit from the other partner—this also holds good in case the same later on after marriage gets such a child.

And the law further prescribes that in this case the partner who has demanded the division of the property may also demand that it is to be carried out in such a manner that each of the partners first obtains what he or she has brought into the marriage or inherited during marriage. (In this way one partner can deprive the illegitimate child of the other of the inheritance of his or her special property.)

An addition was simultaneously made in the divorce law by which the innocent partner can demand divorce and the division of the common property as above mentioned.

The question which is here raised calls for a wider solution. According to Norwegian law the surviving partner has the right to manage the common property undivided after the death of the other. This right ought to be extended both in regard to legitimate children of previous marriages and to illegitimate children on both sides. During the debate about these laws, it was assumed that such a reform ought to be made as soon as possible. The Children's Rights Laws will undoubtedly accelerate this reform.

It was not, however, the economic side of the question which was urged by the opponents of the bill when they pleaded consideration for the wives as an argument against the bill. They depicted in strong colours the sorrow and shame of the wives and the legitimate children when at the death of the husband and the father the illegitimate child came forward with a claim of inheritance on the division of the property—they would then first be aware of the existence of the child. In their anxiety they went so far as to say that such a surprise would become common in the so-called "better" homes, as if these homes would be filled with illegitimate children if this law was put into force!

Now—apart from this exaggeration—it must be argued that the sorrow and disgrace are more due to the actual existence of this child and to the lies and concealment about it, than to the fact that its existence is at last revealed to the man's family. The Children's Rights Laws aim expressly at preventing the claim to inheritance from an illegitimate child coming as a surprise to a man's family after his death. A man owes it to his wife to tell her the truth. It is the lie which is degrading, injurious to marriage, and offensive to the wife and her children.

But further: if the illegitimate child is legally entitled to know who are its parents, and if society is of opinion that this is a matter of justice to the child, it cannot be deprived of this right for the reason that it brings distress to the father's family. The father cannot for this reason be freed from his responsibility. If a man steals or commits another criminal action no one demands that he shall be free from punishment or responsibility because it will bring sorrow and disgrace to his family. Still less can this argument be pleaded when it implies an injustice to an innocent child.

Statistics.—This demand for the increasing of a father's duties to his illegitimate child was considerably strengthened by the result of the official investigation into the economic and social position of unmarried mothers and their children.

These investigations were undertaken in 1906–7 under the guidance of the present director of the Statistical Central Bureau, N. Rygg. They presented a dark picture of the existing conditions, especially in regard to still-births and infant mortality.

It was stated that the still-births in the years 1891–1900 amongst the illegitimate children were 164 to 165 compared with 100 still-births amongst the legitimate children. The district doctors stated the reasons for this to be—besides venereal disease in several towns—unsatisfactory obstetrical help, concealment of birth, and the mother's needy position during the pregnancy. They say that besides the unfortunate conditions of life in which these future mothers are living, especially in respect to lack of proper nourishment, there is their depressed state of mind—they feel miserable and fear the coming disgrace. Further, they cannot to the same degree as married women take care of themselves at their work, they try to conceal their condition, they lace their stays too lightly or dress themselves inadequately. Sometimes also they try by more or less conscious efforts to induce a premature birth through over-work, violent movements, carelessness, and also by the use of drugs.

A still graver impression is produced by investigation of the mortality of children born out of wedlock.

It is stated that the mortality of illegitimate children in proportion to that of the legitimate ones is:

In the first month of life . . .	195 to 100
,, ,, second ,, ,, ,, ...	239 ,, 100
,, ,, third ,, ,, ,, ...	274 ,, 100

nearly three times as great.

In the whole year the death-rate of the illegitimate children compared with that of legitimate children was about 2 : 1.

The investigations proved further that the infant mortality of these unfortunate children had become considerably higher during the last twenty years.

The reports of the district doctors give the following reasons: artificial nourishment or a generally inadequate nourishment—the circumstance that the mother leaves her child to others for a small payment in order to be able to get work; bad hygienic conditions and bad nursing. In some districts inherited illness. These reports with their detailed descriptions of the conditions of these children that are left to others and the small payment for them as a consequence of their own mother's desolate position, show the hard fate in store for these children and their mothers.

The number of illegitimate children in Norway is annually 4,000—*circa* 7 per cent. of all children born alive.

Affiliation Proceedings.—According to the previous legislation the father—that is, he who recognises or by a Court is proved to have had intercourse with the mother at such a time that he can be the child's father—is obliged "to contribute to the expenses of the woman's confinement and proper nursing, and to pay—partially or wholly according to the circumstances—for the maintenance and education of the child until it has completed fifteen years. The expenses are to be adapted to his economic position and to that of the mother."

These payments are only to be made upon the demand of the mother. They are to be fixed by the magistrate and are collected by the administration.

Only 40 per cent. of the mothers claim the alimony, and only 25 per cent. of the claims for confinement expenses are decided by the magistrate. The mothers shrink from making their claims for fearing of offending the father of the child.

The allowances are mostly very small. According to Director Rygg they were—apart from Kristiania—in two-thirds of all cases between 25*s.* and 76*s.* annually in the first year of the child. In Kristiania most of the allowances were between 90*s.* and 154*s.* The contributions to the expenses at the birth are usually fixed at 13*s.* to 19*s.*, often however at 26*s.* or 38*s.*, and sometimes higher.

It is often very difficult to get the allowances collected, especially since the repeal of the Vagabond Law in 1900, under which it was possible to apply forced labour to the men who did not pay the allowances.

Financial Assistance under Laws of 1915.—The new laws have increased and enforced the financial responsibility of the father to mother and child. The absolute need for these measures was established by the investigations and the report of the district doctors. It was also urged by the committee of experts, by the Medical Director of the kingdom, by Professor Brandt and Professor Axel Johannessen, who were asked to give their opinion.

But if the father fails in his duty, society must give its assistance not only by applying compulsion towards the negligent father, but by financial support of the mother.

The Children's Rights Laws have considerably increased the scale of payment and the minimum amount to be paid as alimony. Compulsion can be applied to the negligent father by the reintroduction of forced labour and the increased control of emigrants.

The payments to the mother are:

(1) For the last three months before the birth of the child at

least 22*s*. 3*d*. a month in the towns and at least 16*s*. 8*d*. a month in the country.

(2) The expenses of her confinement, for which the payment is to be at least 33*s*. 4*d*.

(3) Payment to enable the mother to nourish her child for nine months. The amount in the towns is to be at least 22*s*. 3*d*. for the first month and at least 16*s*. 8*d*. a month for the subsequent eight months—in the country likewise 16*s*. 8*d*. and 11*s*. 1*d*. a month.

Altogether the minimum contributions to the mother are thus in the towns £12 15*s*. 8*d*., in the country £9 8*s*. 8*d*.

The new laws also established a minimum for the contribution towards the bringing up of the child—varying according to whether the child is brought up in the town or the country. In the first case the minimum till the child is fourteen years old is £10, from the fourteenth to the sixteenth year £7 10s—in the country likewise £7 10*s*. and £6 12*s*. 4*d*.

Besides these, are payments towards the baptism and confirmation, and if necessary towards the illness of the child and its burial. Contributions towards the upbringing of the child can in special cases also be levied after the child's sixteenth year.

The child remains with the mother, and the duty of contributing to the child will therefore as a rule be imposed on the father. If, however, the mother leaves the child to others, and it is neglected, the magistrate can give the child to the father, if this is considered best for the child. In this case the mother will be made to pay contributions according to her economic condition. If neither of the parents has the care of the child, both shall pay contributions.

The Establishment of Paternity.—An important part of the law deals with the establishment of paternity.

Every birth is to be notified, and it is the duty of the mother to give the name of the father. She may do this before her confinement. As soon as this information has been given, the magistrate has to draw up a document imposing the necessary contributions for child and mother on the father named by her. This document is forwarded to the father. If he denies that he is the father of the child, he must within a certain time appeal to the judge and ask for an action to be laid against the mother. This is done by the administration without any expense to either of them. The whole procedure is in this way independent of the demand of the mother.

One important alteration has also been made in the procedure by the abolition of the oath taken by one only, so that the issue of the case shall hereafter not be made dependent on the subsequent oath of one party. On the contrary, both parties will now have the same duty to appear in court to give evidence as witnesses during the procedure, and when the parties have given their evidence, the judge may make both of them take the oath or one of them, or omit the oath altogether.

The father named is by the sentence of the Court judged to be the father of the child, if the Court considers it proved that he has had intercourse with the mother at such a time that according to the order of nature he can be the father of the child, and the Court has not reason to believe that the mother has had such intercourse with any one else or no other circumstance is stated which make it doubtful that the notified person is the father of the child.

The man thus sentenced to contribute is subject to the same rules about contributions to the mother and child as the one who according to his own admission is the father of the child.

If the father named omits to take action within the fixed time, this is considered as a recognition of his paternity.

Experience shows that in almost all cases no doubt exists about the actual paternity. It will certainly hereafter be the rule that the father named acknowledges his paternity either expressly or tacitly.

If, however, the question of paternity must be decided by a Court, the law, as will be seen, proceeds very cautiously. It is only when there is no uncertainty that the Court gives its decision on the paternity. If the mother, *e.g.*, has a bad reputation, a presumption will arise which will generally exclude a decision of paternity, even if cohabitation within the natural space of time is proved. The father will then only be sentenced to pay contributions, and the child will not obtain the right to inherit from him or to take his name.

Law about providing for the Children.—Despite the new rules to secure contributions from the father, the experts who were among those who drafted the legislation were not satisfied with these means to protect the mother's economic position and also to counteract the great mortality of the illegitimate children. Many a mother would still be unable to keep her child with her after birth either because the father cannot be found, or cannot be found quickly enough, or because he is not able to pay a sufficient contribution, or because he refuses to pay as much as he is able to pay.

They stated that it is of the greatest importance to the vitality and health of the child as far as possible the mother should not suffer want during her pregnancy, and that she should be enabled to keep her child and suckle it at any rate in the first months after its birth.

They accordingly recommended that the municipalities should give contributions to encourage the breast-feeding of the child by the mother.

The sixth law on children's rights was drawn up with this end in view. This law applies specially to unmarried mothers and to married mothers whose husbands are dead or have left them, or whose bad conduct is responsible for the fact that they do not live together. It can, however, also be applied to other married mothers according to the decisions of the local authorities.

The principal rule of the law is that when a mother is so badly situated that she must leave her child to others, she can demand help from the municipal funds of her place of residence. The help shall be sufficient to enable her to keep the child with her for the first three months. If the municipal authorities state, on the authority of a doctor or a midwife, that the health of the child requires that the breast-feeding be extended beyond the first three months, the help is to be given for a longer period, not more however than for another three months.

A woman who is with child and cannot earn her living can besides demand help from the municipal funds for the last six weeks before her confinement.

The application is in both cases to be decided by a committee of three members of the health board and one of them must be its chairman, who as a rule is a doctor.

The contributions are fixed by the county magistrates beforehand at certain monthly amounts for each municipality. They are to be within the following limits: For the last six weeks before the birth, from £1 7*s*. 9*d*. to £2 10*s*.; for the first month after the birth, from £1 2*s*. 3*d*. to £2 10*s*.; and for each of the subsequent months from 18*s*. 11*d*. to £1 18*s*. 11*d*. Before the magistrate fixes the amount of the contribution he must have consulted the guardians of the poor and the health board of the parish concerned. The amount is fixed for five years.

If the woman gets maternity benefit from the sick insurance, this money will be subtracted from the contribution of the municipalities for the corresponding period. Apart from this, the municipality has the right to get the money refunded from the contributions legally due from the father to the mother and child, not however from the contributions to the confinement expenses, but only from contributions due for the period during which the municipality has given support.

These expenses are calculated by the department at £8,000 annually. They are to be paid by the county councils, but parishes that are poor can get one-third and in special circumstances one-half of its contributions refunded from the State, if the Storthing grants money for the purpose.

Municipal support of the mother which is given in accordance with this law is not considered as pauperising her. On the other hand any money which the county council is entitled to have refunded by the father, but fails to obtain from him, is considered as pauperising him.

All six Children's Rights Laws came into force on January 1, 1916, except the law with regard to the economic relation between married people and the divorce law, which will come into force on January 1, 1917. The new law of inheritance only applies to children born after January 1, 1917.

Maternity Insurance.—The Children's Rights Laws have for their chief aim the protection of the unmarried and deserted mothers and their children.

One step further has been taken in this direction by an expansion of the provisions for maternity insurance. The new law applies to all mothers without means in the country.

It is obligatory for all women who work for wages for others (*e.g.* all servants), and also for the wives of men who are wage-earners. The income limit is in the towns £100 and in the country £88 17*s.* 9*d.* But besides these, all others above these income limits are admitted to the insurance as voluntary members, even if they are not wage-earners.

The first step towards maternity insurance was made in the sick insurance of 1909, which gives the insured women (not the wives of insured men) the right to 60 per cent. of their average wage during the first six weeks after the confinement (six times six days). This corresponds to the prohibition of the factory law against the employment of women in factory work during the same period.

The number of the women who are benefited by this maternity help is comparatively small. Most of them are unmarried women. The great mass of the working-class women have had no help from this insurance. Experience and close investigations showed, however, how help and protection are badly needed in these poor homes.

The conditions in a poor home for the mother, when she is with child, are in many cases detrimental both to her and the child. She lacks the most necessary rest and nursing, and absence of means makes her continue the housework longer than it is right to do, and to begin it again long before she ought to do in the interests of the health of herself or her child. Poverty and helplessness during this period have more effect and cause more illness and death than at other times. The decreasing birth-rate is possibly to some degree due to the revolt against this misery and helplessness of the mothers.

In all countries efforts are being made to discover remedies for this state of affairs. The recognition by society of its interest in the protection of motherhood and the health of the infants is everywhere making headway. But the task is so great and so much financial assistance is needed, that the progress has been small.

The new measure of maternity insurance is connected with the sick insurance. The most complete arrangement would be of course that this help to mother and child should become a wholly independent institution, the expenses of which were paid by the State. The situation was, however, that if anything of importance could be obtained in the near future it had to be adapted to the insurance already in existence, the sick insurance, as was the case with the limited maternity insurance. The foundation is thus laid for a further extension in the same direction.

The maternity insurance will now be applied to 25,000 to 30,000 births annually, almost one-half of the whole number of births in Norway. It includes "maternity benefit," gratuitous medical help, and midwife help.

The maternity benefit is now to be awarded to the directly insured women not only in the six weeks after the birth, but also in the two weeks before. The amounts are also increased. They are now for the different income classes 8*d.*, 10½*d.*, 1*s.* 8*d.*, 2*s.* 4*d.* a day, thereafter 1*s.* 1¼*d.*, 1*s.* 8*d.*, 2*s.* 4*d.*, 3*s.* That means previously an amount from £1 3*s.* 4*d.* to £4 4*s.* 5*d.* altogether, and now from £2 13*s.* 4*d.* to £7 4*s.* 5*d.*

The most important thing is, however, that the wives of the insured men hereafter are included without any increase of the man's premium. The maternity benefit was by the Government fixed at £2 0*s.* 5½*d.* This amount was by the Storthing cut down to £1 13*s.* 4*d.* on account of the difficult financial conditions during the war.

The insurance also provides for gratuitous midwife help, both to the directly insured women and to the wives of insured men. The expenses of this help are calculated on an average at 18*s.* 10½*d.* to £1 for each birth.[1]

The law on maternity insurance contains a direct inducement to establish municipal maternity homes. all over the country. The law provides that the mother can get gratuitous treatment and living in the maternity home instead of maternity benefit, and this money will in this case be paid to the maternity home. Several women in Norway have of late raised a strong movement for the establishment of municipal maternity homes. The maternity insurance will be an important financial support to such homes.

The miserable conditions of the midwives and their social position will also be improved by the maternity insurance. They will be better paid and will be more able to rely upon obtaining the money due to them. There will be a greater demand for the services of midwives on account of the maternity insurance. It is significant of the present conditions that according to the report of the President of the National Health Board, between eight and ten thousand births take place annually in Norway without any assistance by a midwife. The mothers cannot afford to pay for them and fetch them from long distances.

When the maternity insurance was enacted in England a sharp contest arose about the question to whom should the maternity benefit be paid, to the wife or her husband. In Norway it was decided without any great opposition that the money as a rule was to be paid to the wife personally. It is of no importance who is to receive the money in good and orderly homes, but we do not want that the husband who is given to drink or is negligent should be able to get hold of the maternity benefit of his wife.

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[1] The estimates of the maternity insurance are calculated to amount to about £80,000 of which the sick funds contribute six-tenths, the State two-tenths, the municipalities one-tenth, and the employers one-tenth.

I approach here a social evil which is nearly related to the question of the prosperity of mothers and children : the drinking evil. The struggle for the abolition of alcohol is in close touch with the elevation of motherhood and the protection of children.

The drinking habit ravages thousands of homes, terrorises and tortures thousands of wives and injures the offspring. Therefore the prohibition movement has become one of the most important tasks of the Norwegian democracy. In Norway with universal suffrage for women and men it must succeed. We know that we are in alliance with the democracy of the other Scandinavian countries in this work. The Norwegian people observe with great interest the work in Sweden, and the great majority rejoice to see the progress of the Swedish prohibition movement.

SOME NOTES ON THE DECISIONS OF THE FRENCH PRIZE COURTS.

[*Contributed by* C. J. COLOMBOS, ESQ., LL.D.]

THE history of prize jurisdiction in France would provide a very interesting study, but space is afforded here for only a rapid review of its chief developments.

The History of the Jurisdiction.—Jurisdiction on prize matters was exercised, from the fourteenth century, by the Admiral, assisted by a Council.[1] The first French Prize Court was thus the *Conseil de l'Amiral.* All appeals from its judgments lay to the Finance Section of the King's Council. This jurisdiction, as reorganised and reconstituted by Letters Patent of December 20, 1659, and by the Règlement of March 9, 1695, subsisted up to the end of the old Régime, and was exercised for the last time during the war of American Independence. At the Revolution a law enacted on February 14, 1793, conferred exclusive cognisance of prize questions to the Commercial Courts. This legislation was probably inspired by the fact that at that time the war by privateers on the enemy's trade was far more effective than that by the State navy, and further by the consideration that captors and captured were all alike merchants. This jurisdiction, however, presented two inconveniences: an absence of unity in prize jurisprudence due to the multiplicity of the Commercial Courts, and secondly, a deficiency in the competence of those Courts on questions of international law. The first step of the Consulate was therefore to abolish this jurisdiction, and to institute a special Prize Court (*Conseil des Prises*). This organisation was maintained under the First Empire, but an appeal was allowed from its judgments to the Conseil d'Etat,[2] although the Emperor reserved to himself the final decision on all prize matters. Under the Restoration and the July Monarchy, a period of nearly forty years, cognisance of maritime prizes was attributed, in first and last resort, to the Conseil d'Etat. But the colonial expeditions and the wars undertaken by the Second Empire rendered it imperative that a special Prize Court should be instituted, and the Decree of July 18, 1854, conferred prize jurisdiction, for the duration of the Crimean War, to a *Conseil des Prises* organised on nearly the same principles as that under the First Empire. The same Decree was put again into force on May 9, 1859, on the outbreak of the Italian war, and finally this organisation has been definitely maintained by the Decree of November 28, 1861. After the war of 1870–1871, and excluding a few judgments given during the operations against China in 1889, no occasion arose for any decisions on prize matters until the present European war. The first sitting of the Prize Court was held at the Palais-Royal, Paris, on August 22, 1914. The Court was transferred, with the Government, to Bordeaux from the beginning of September to the end of December 1914, but has resumed again its sessions at Paris from this latter date.

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[1] Ordinance of Charles V., dated December 7, 1373.

[2] Decree of June 11, 1806 (Art. 14, No. 3).

It should be noted that the French Prize Court, by its organisation and composition, takes its place among the administrative (and not the judicial) tribunals of France. It is composed of a Conseiller d'Etat as President, and of six members who are usually chosen from among the Maîtres des Requêtes and the higher officials of the Ministries of Foreign Affairs and Marine. By Art. 9 of the law of May 24, 1872, all appeals from the decisions of the Court lie to the Conseil d'Etat, sitting as a General Administrative Assembly, and on the report of its Section of Legislation, Justice and Foreign Affairs.

The present short notes on the jurisprudence of the French Prize Court do not purport to give any exhaustive survey of the important and numerous cases which have up to now been decided by this Court. An attempt has only been made to classify some of these decisions, and to show the principles of international law that have been applied to them.

I. Ships.

Enemy Ships.—The first case decided by the Court was that of the German steamer *Porto* captured at sea on August 5, 1914, having left its last port of departure before the outbreak of the war between France and Germany, and being still ignorant of the commencement of hostilities. Art. 3 of Convention VI. of the Second Hague Peace Conference, 1907, exempted this steamer from confiscation, but as Germany had not agreed to this article, the Court condemned the *Porto* as lawful prize (November 10, 1914).[1] Similar decisions were given on the captures of the German ships the *Barmbek* (December 8, 1914), the *Frieda Mahn* and the *Martha Bockhahn* (December 29, 1914), the *Walküre* (June 8, 1915).[2]

In the case of the German steamer *Czar Nicolai II.*, seized under identical conditions, the shipowners contended that the Court was bound to apply para. 1 of Art. 3, and that the vessel might, consequently, not be confiscated, as the reserves made by Germany had a limited interpretation, and referred only to para. 2 of this article, which placed in a position of inferiority all those Powers which, as in the case of Germany, had very few maritime bases outside their home coast; its provisions were therefore contrary, in the opinion of the German Government, to the principles admitted by the law of nations stipulating that every international agreement must be founded on reciprocity and equality among the contracting States. The Court rejected this interpretation and held that, whatever may have been the reasons produced by Germany for not accepting this article, its provisions formed an indivisible whole, and the German Government by refusing to agree to it had deprived its subjects of all rights of claiming the benefits deriving under it. Order was therefore given for the condemnation of the steamer (December 29, 1914).[3]

The two questions that a Prize Court has no jurisdiction for deciding on the validity of maritime captures effected (*a*) on enemy men-of-war, and (*b*) on vessels seized in a lake or inshore, presented themselves in the case of the shallop *Rohlfs*, belonging to the German Governor of Coco-Beach.[4] As neither of these two exceptions could be sufficiently proved, as no ship's papers had been found on board, and as no claim had been entered for the release of the vessel by the parties interested, the Court pronounced the capture of the prize as valid (May 5, 1915).[1]

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[1] *Journal Officiel*, March 30, 1915, p. 1732.

[2] The English Prize Court (Sir Samuel Evans, President) has adopted the same interpretation in the condemnation of the *Perkeo* (September 4, 1914) and the *Marie Glaeser* (September 11, 1914).

[3] *Journal Officiel*, April 19, 1915, p. 2369.

[4] In the case of the *Roumanian* (December 7, 1914), the English Prize Court has held that all maritime captures of enemy property, wherever effected (and even on land, as distinguished from a port), fell within the jurisdiction of the Prize Court.

The rules laid down in the Marine Ordinance of August 1681, and in the Règlement of July 26, 1778 (considered as being still in force), by which the nationality of the vessel must be established by the documents found on board, and Art. 57 of the Declaration of London, 1909, ruling that the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly, were all applied in the condemnation of the German steamer *C. Ferd. Laeisz* (January 17, 1916).[2]

In the cases of the barque *Rosita* and the tow-boat *Cydnus*, the Court held that, in virtue of the enactments above referred to, when a ship at the moment of capture is not flying any flag at all, and no papers are found on board indicating that the vessel had the right to fly the flag of any Power, the prize is to be declared as good and lawful (September 23 and December 6, 1915).[3]

The nationality of a great number of Ottoman ships was established by application of the same principles, and the state of war existing between France and Turkey was derived by the Court from the fact that a French merchantman had been fired upon by the Turks on October 29, 1914, during the bombardment of the port of Odessa, two French subjects having been thereby killed on board the steamer. The vessels were consequently condemned as having a hostile character (cases of the *Mahrousseh* and the *Kassed-Kerim*).[4]

Neutral Ships.—The Spanish steamer *Federico* was seized at sea on October 10, 1914, and conducted to Toulon for search. The vessel was being used as a transport for numerous German and Austrian passengers domiciled in Spain on their way home to join the armies of their respective Governments. The Court was called upon to decide, in the first place, on the regularity of the capture, and secondly, on its validity. On the first point, the Court ruled that, as at the moment of seizure the rough state of the sea did not allow the French capturing cruiser to proceed to the search of the steamer on the high seas, the vessel could regularly be conducted to Toulon where the search was effected.[1] On the second question, the Court condemned the *Federico* as lawful prize, on the charge of unneutral service, as evidence proved that the vessel was, at the time of her capture, on a voyage specially undertaken with a view to the transport of individual passengers embodied in the armed forces of the enemy. This point falls under the provisions of Art. 45 of the Declaration of London of 1909, and it is interesting to note that the General Report presented to the Naval Conference by its Drafting Committee expressly excludes from the meaning of the word " embodied " those individuals who, as in the case of the *Federico*, although summoned to serve in virtue of the law of their country, had not yet really joined the corps to which they belonged. The French Prize Court, consequently, gave to the word " embodied " an extended application and it justified its decision on the ground that the Declaration of London of 1909 (adopted and put in force by France by a Decree dated August 25, 1914) had not been ratified by the French Government and constituted therefore an unilateral act of this Government; it consequently belonged to the Prize Court which was called upon to apply its provisions to construe and interpret their meaning (March 15 and 16, 1915).[2]

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[1] *Journal Officiel*, June 13, 1915, p. 3878.

[2] *Ibid.* February 16, 1916, p. 1328.

[3] *Ibid.* October 26, 1915, p. 7705, and January 21, 1916, p. 572.

[4] *Ibid.* December 17, 1915, p. 9272, and December 18, 1915, p. 9317.

The Norwegian steamer *Heina* was engaged, under the orders and the control of an agent specially placed on board by the German Government, in the supply of coal and foodstuffs to the naval forces of Germany off the Atlantic and Antilles seas. In virtue of Arts. 37 and 46 of the Declaration of London, 1909, the vessel was liable to condemnation, but the owners opposed with a plea founded on the place where capture was effected, and asking for an order granting nullity of capture by application of Art. 2 of Convention XIII. of the Second Hague Peace Conference, 1907, as having been made in violation of the Danish territorial waters. The Court, however, condemned the prize, as it was established that the seizure had taken place five to six miles off the Danish coast. Although Denmark had on May 6, 1882, departed from her traditional rules governing the limits of her territorial waters as regards the regulation of the fisheries in the North Sea, in all other questions, and especially in prize matters, she has always maintained her old rule fixing at four miles the extent of the territorial maritime belt (September 29, 1915).[1]

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[1] The same decision was arrived at in the case of the *Barcelo*, July 20, 1915 (*Journal Officiel*, August 22, 1915, p. 5913).

[2] *Ibid.* May 10, 1915, p. 2995.

The last case to be examined in this section is that of the steamer *Persepolis*, seized off Alexandretta Bay on April 1, 1915, sailing under the Persian flag. The case presented the peculiar feature that no ship's papers could be found on board sufficient to prove the vessel's nationality; there was no charter-party, no muster roll, and the log-book was not kept day by day. The only document which was produced was the passport book, and even this was considered as irregular as no mention was made of the steamer's last voyage. There was therefore reasonable presumption that the vessel was employed in operations having a hostile character, and the Court, by application of Arts. 4 and 5 of the Règlement of July 26, 1778, decreed that the capture was lawful (January 31, 1916).[2]

National Ships.—The steamer *Ariadne* was flying the French flag at the time of her seizure (May 10, 1915), having been duly registered at Cherbourg and Havre as a national vessel since 1895. The French Marine Minister had on May 21, 1915, struck off this ship from the National Merchantmen's Register on the charge that, owing to a mortgage, she was the property of a German steamship company. The Court decreed that the *Ariadne* had the character of a national steamer within the meaning of Art. 57 of the Declaration of London of 1909. The vessel having been in possession of French nationality since 1895, there was no question, in this particular case, of any transfer of flag consequent upon the outbreak of war. It was true that the right to fly the French flag had been withdrawn from the steamer on May 21, 1915, but this withdrawal was posterior to the seizure. The Court held that, in order to appreciate the validity of a capture, it is the character and civil status of the captured vessel at the time of seizure that must be considered, as all subsequent changes, cessions, transfers, registrations, or withdrawal of registration have no legal effect as regards any advantage or disadvantage that might thereby result either to the belligerent captor or to the captured vessels or cargoes. Seizure was accordingly declared null and void (September 21, 1915).[3]

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[1] *Journal Officiel*, November 7, 1915, p. 8014.

[2] *Ibid.* March 13, 1916, p. 2018.

[3] Similar decisions were given in the cases of the following French steamers: the *Bon Voyage* (September 21, 1915); the *Willkommen* (September 23, 1915); the *Au Revoir* (February 14, 1916).

Transfer of Flag of Enemy Ships.—The steamer *Colonia*, captured October 27, 1914, had been attached to a German port up to July 31, 1914, and was the property of a German subject who, at this latter date, transferred the steamer to a limited liability company which he caused to be registered in England under the Companies Act, by taking for himself, as part payment for the ship, 80 per cent. of the total number of the company's shares.[1] In spite of this transfer, the *Colonia* continued to sail under the German flag, and it was only on August 24, 1914, during her voyage from Ayamonte to Bordeaux, that she hoisted the English flag. The transfer of property had thus been concluded only four days before the outbreak of the hostilities, whilst the transfer of the maritime flag had been effected *in transitu*: these facts proved that both transfers had been made to avoid the consequences resulting from the enemy nationality of the steamer and for the purpose of defeating the rights of the belligerents.[2] This was therefore a clear case for condemnation within the meaning of Art. 7 of the Règlement of July 26, 1778. Art. 56 of the Declaration of London, 1909, likewise enacts that "the transfer of an enemy vessel to a *neutral* flag, effected after the outbreak of the war, is void unless it is proved that such a transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed," and further establishes an absolute presumption of nullity "if the transfer has been made during a voyage." The Court held that there was no legal motive justifying that different rules should be applied to transfers made, instead of to a neutral flag, to the flag of an allied State or even to that of the French State (May 18 and 19, 1915).[3]

The case of the steamer *Dacia* gave rise to a full discussion of the principles governing transfers of enemy vessels to a neutral flag. The facts of the case, briefly put, are as follows: the *Dacia* was at the beginning of the war and till January 4, 1915, registered at Hamburg and owned by a German steamship company. At this date, the vessel was nominally sold to an American subject, who duly effected registration of the ship at Port Arthur, Texas. At the moment of her capture the vessel was sailing under the maritime flag of the United States of America, from Norfolk, Virginia, to Rotterdam, carrying a consignment of cotton apparently destined to this port, but which the manifest of cargo found on board showed to be really destined to Bremen (Germany). Further investigation of documents established that, at the time of her seizure, the vessel was availing herself of her transfer under a neutral flag, specially obtained to this end, in order to transport goods to an enemy destination in execution of contracts passed on behalf of enemy interests before this transfer, and while she was still under the enemy flag, such contracts having been entered into under the express condition that the vessel would be transferred to the neutral flag. The legal enactment applicable to the case was evidently Art. 56 of the Declaration of London of 1909, but in order to arrive at the facts of the case and for the object of deciding whether transfer was fictitious and specially effected with the intention of evading the consequences resulting from the nationality of the vessel, or whether such transfer was real and sincere and made in good faith, *bona fide*, the Court found it necessary to interpret the principal provisions of this article. It is interesting to note that during the proceedings of the Naval Conference of 1909, a divergency of opinion was manifested as regards the meaning of the words "good faith," which it was proposed to adopt as the criterion of the validity of the transfer. The United States Delegation sustained that good faith existed in all cases in which the contract of the transfer was sincere and final and contained nothing fictitious or irregular, whilst the British and German Delegation construed the words as meaning the absence, among the reasons which had decided the transfer, of the intention to avoid the capture of the vessel. As a result of these proposals and in accordance with the original text presented for adoption to the Conference by its Drafting Committee, the transfer should not be recognised as valid unless there existed sufficient ground for establishing that such transfer would equally have taken place if the war had not broken out.[1] The General Report accompanying the Declaration of London, whilst making full provision for a possible proof to the contrary, explains clearly this interpretation by stating that the transfer admissible by the belligerents is that which had not been motived or prompted by the existence of the state of war.[2] This meaning has been adopted by the German Prize Rules,[3] by the Austrian Instructions to the State Marine,[4] by the Russian Prize Regulations,[5] by Italian legislation,[6] and finally by the legislation of Great Britain and France which have adopted and put into force in identical terms the Declaration of London of 1909.[7] The French Prize Court ruled that this was likewise the interpretation which it intended to adopt in declaring null and void the transfer of the *Dacia* under the American flag. This vessel, in fact, had not only been engaged, after her transfer, in the same ordinary trade which she was carrying before her transfer (as in the case of the *Jemmy* in England, July 17, 1801, 4 C. Rob. 31; and the *Benito Estenger* in the United States, March 5, 1900, 176 U.S. 568), but was also effecting, at the moment of her capture, the voyage for which she had been freighted at the time when she was flying the German flag and for which she had been specially transferred under the neutral flag. A similar transfer had undoubtedly as its object to allow an illegal enemy trade, and could not, consequently, be admitted by the belligerent captor (August 3 and 4, 1915).[8]

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[1] The question of the status of English companies owned by alien shareholders was discussed fully by the English Prize Court, but was not decided, in the cases of the *Tommi* and the *Rothersand* (October 12, 15, 1914). Compare also the case of the *Poona* (May 3, 1915).

[2] In the same case of the *Tommi* and the *Rothersand*, Sir S. Evans applied, after a very exhaustive and learned discussion of the provisions of Arts. 55 and 56 of the Declaration of London, similar principles. He further held that in any event, and apart from any presumptions laid down in this Declaration as to the lapse of time that has been preceded or followed these transfers in relation to the actual outbreak of the war, all transactions, in order to be admitted, must have been completed not merely by letters and telegrams passing between the parties, but by formal documents necessary to complete the title being executed.

[3] *Journal Officiel*, June 15, 1915, p. 3952.

II. CARGOES.

Cargoes on Enemy Ships.—By application of Art. 59 of the Declaration of London, 1909, the Court has invariably held that goods sailing under an enemy flag are to be presumed as enemy goods unless the contrary is proved.[9] In the first case decided by the Court, that of the German steamer *Porto*, the cargo found on board and destined for a German firm, was considered as being enemy property and was consequently condemned, as the French claimants of the goods failed to justify that, at the time of capture, they had still the right of disposal and ownership of the goods (November 10, 1914).[1] But in all cases where it was proved that the cargo upon the enemy ship was not the property of an enemy subject, then order was given for the release of the goods or the proceeds of the sale. The following are two of such cases:

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[1] *Proceedings of the International Naval Conference*, pp. 183, 260.

[2] *Ibid.* pp. 212, 326.

[3] *Prisenordnung*, September 30, 1909, chap. ii. Art. 12; *Reichgesetzblatt*, August 3, 1914.

[4] *Dienst Règlement für die k. u. k. Kriegsmarine*, 2, v. 13, 3, Art. 3.

[5] *Règlement sur les Prises*, March 27, 1895, Art. 7.

[6] Royal Decree of June 3, 1915; *Gazzetta Ufficiale*, No. 150, June 15, 1915.

[7] Order in Council, October 29, 1914; French Decree, November 6, 1914.

[8] *Journal Officiel*, August 26, 1915, p. 5994.

[9] The same view has been adopted by the English Prize Court. *Held*, that

(*a*) Cargo of solar oil on board the German steamer *Czar Nicolai II.*, consigned to a Belgian company situated at Antwerp. Claimants produce one copy of the bill of lading together with the invoice of the goods. The Court held that the material possession of one bill of lading made out "to order" and endorsed in blank was not sufficient by itself to establish right of property in the cargo, but that the simultaneous production of the bill of lading and of the invoice could be reasonably accepted as justifying this right (December 29, 1914).[2]

(*b*) Cargo of vaseline oil on board the same steamer. The Belgian consignees exhibited all the copies of the bills of lading made out in sets of three, the invoice of the goods, the contract passed between them and their shippers, and an extract of the shippers' books, all of which documents, in the opinion of the Court, fully established that the consignees were the real owners of this cargo at the time of capture (July 26, 1915).[3]

Para. 2 of Art. 4 of Convention VI. of the Second Hague Peace Conference, 1907, exempts from condemnation the enemy cargoes found on board enemy vessels which left their last port of departure before the commencement of the war, and are encountered on the high seas while still ignorant of the outbreak of hostilities. This was the case of a cargo of mineral oil on board the German steamer *Czar Nicolai II.*, but the Court condemned these goods as Germany had refused to be bound by Art. 3 of this Convention, and as a

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property upon an enemy ship consigned to an enemy port is *prima facie* enemy property, and it is for the claimants who allege that the property belongs to them, as neutrals, to make out clearly their case. The *onus probandi* is on the claimants. (Case of the *Roland*, March 22, 29, 1915.)

[1] *Journal Officiel*, March 30, 1915, p. 1732.

[2] *Ibid*, April 19, 1915, p. 2369.

[3] *Ibid*. August 23, 1915, p. 5932.

matter of consequence of para. 2 of Art. 4 to which Art. 3 refers (December 29, 1914).[1]

Cargoes on Non-Enemy Ships.—(*a*) *Conditional Contraband.*—It has been invariably held by the French Prize Court[2] that in all cases of articles constituting conditional contraband, it is, in principle, incumbent upon the captor to prove, before condemning the goods as contraband of war, that the goods are in reality destined to the armed forces or a Government department of the enemy State.

But if the documents or other evidence produced before the Court are not sufficient to enable the captor to supply this proof, as for instance in the case of a bill of lading made out to " order," then the captor is entitled to seek in the circumstances of the case all the facts which serve to determine the real ultimate destination of the goods.[3]

There is sufficient presumption that the goods have a destination which justifies their condemnation as articles of contraband of war in the following principal cases:

(i) If the neutral ports to which the goods are ostensibly destined can be assimilated to " enemy ports." A considerable number of cargoes apparently bound for Dutch ports were condemned on this principle, as in virtue of the Rhine Navigation Convention of October 17, 1868, goods consigned to Holland could on arrival transit freely, and without the possibility of a control, on the Rhine and be carried to any frontier point of this river, and could therefore be directed to the German territory, *i.e.* to an enemy territory. Cargoes of flour on the *Nieuw-Amsterdam*, and of rubber on the *Gorontalo*.[1]

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[1] *Journal Officiel.* April 19, 1915, p. 2369.

[2] The Dutch steamers *Nieuw-Amsterdam* and *Oranje Nassau*, February 18, 19, 1915, and July 19, 1915 (*Journal Officiel*, April 21, 1915, p. 2458, and August 19, 1915, p. 5819); the Norwegian steamer *Eir*, April 15, 16, 1915 (*ibid.* June 1, 1915, p. 3517); the British steamer *Narrovian*, July 3, 1915 (*ibid.* August 4, p. 5394).

[3] The English Prize Court has held equally that it is incumbent upon the captors in the first instance to prove facts from which a reasonable inference of hostile destination can be drawn, subject to rebuttal by the claimants. But, as regards the ultimate hostile destination of conditional contraband, captors need only show a highly probable military or Government destination, and need not prove the particular enemy port or place of ultimate destination. It is not incumbent upon captors to prove an intention on the part of the shippers at the beginning of the voyage, ostensibly to a neutral port, of despatching goods to the enemy. If at the time of the seizure the goods were in fact on their way to the enemy Government or its forces as their real ultimate destination by the action of the shippers, then the belligerent has a right to stop the goods on their way and to seize them as confiscable goods. The *Kim*, the *Alfred Nobel*, the *Bjornstjerne Bjornson*, the *Fridland* (September 16, 1915).

(ii) If the bills of lading covering the goods are either drawn out to "order," or else state that the goods must be delivered to a specified person or "his agents" and should therefore be considered as bills of lading "to order," susceptible of being transferred by a simple endorsement.[2]

(iii) If no bills of lading have been made out and the goods are travelling on a manifest of cargo unsigned by the captain, as in the case of the *Atlas*,[3] or when no documents are found on board indicating the destination of the goods, as in the case of the *Banda*.[4]

(iv) If no claim for the release of the goods is made by the parties interested in the cargo.[5]

In the case of foodstuffs destined to the German territory, the Court held that, as a result of the enactments taken by the German Government at the beginning of 1915 for the object of ensuring control of all foodstuffs existing or imported into its territory, these goods must be considered as destined to the enemy State itself or to its Government departments and therefore liable to capture in terms of Art. 33 of the Declaration of London, 1909.[1]

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[1] February 18, 19, and July 5, 1915 (*Journal Officiel*, April 21, 1915, p. 2458, and August 3, 1915, p. 5357). The English Prize Court has similarly held that a Prize Court is not restricted in its vision to the primary consignments of the goods to a neutral port (in this case, Copenhagen), but is entitled and bound to take a more extended outlook in order to ascertain whether this neutral destination was merely ostensible, and if so, what the real ultimate destination was. The *Kim*, the *Alfred Noble*, the *Bjornstjerne Bjornson*, the *Fridland* (September 16, 1915).

[2] Cargo of coffee on the *Fortuna*, May 11, 12, 1915 (*Journal Officiel*, June 14, 1915, p. 3903). Compare also the decision of the English Prize Court in the *Kim*, where it was held that if shippers after war consign goods of the nature of contraband to their own order, without naming a consignee, it may be a circumstance of suspicion in considering the question whether the goods were really intended for the neutral destination and to become part of the common stock of the neutral country, or whether they had another ultimate destination. The goods claimed on the *Kim* are all consigned to the shippers' order or to the order of their agents, which is the same thing (September 16, 1915).

[3] August 12, 1915 (*Journal Officiel*, September 3, 1915, p. 6210).

[4] July 27, 1915 (*ibid.* August 18, 1915, p. 5789).

[5] The *Boeroe*, May 19, 1915 (*ibid.* June 17, p. 4008). This is also the view taken by the English Prize Court in the *Antares*: "It is the theory of the old Prize Courts, and a very sound one, that the Crown themselves capture or seize a vessel, and the persons whose property is seized must come here in the course of proceedings prepared to give grounds why their property is not confiscable" (March 1, 8, 1915).

But apart from these presumptions, it must be admitted that the French Prize Court has constantly protected the interests of neutrals, and has always granted release of goods when evidence failed to establish that these goods constituted contraband of war. The following are a few of the principles applied by the Court in such instances:

(i) In the case of goods shipped before the outbreak of the war. A cargo of grains had been despatched from the port of Braila on board the Roumanian steamer *Jiul* on August 1, 1914, bound for Rotterdam. The Court held that although the bills of lading covering these goods were made out " to order," the shipment, having been effected before the war, could not be considered as constituting an unlawful trade.[2] A second example is afforded in the seizure on August 22, 1914, of a cargo of foodstuffs on the Dutch steamer *Oranje Nassau*, where it was held that the capture of conditional contraband shipped on a neutral steamer before the commencement of hostilities is not justified, even if the goods are covered by bills of lading " to order," when no proof is established that the consignees could be looked upon as the intermediaries of the enemy Government or its departments.[3]

(ii) In the case of goods shipped on a vessel which left her last port of departure before the declaration of contraband could be reasonably expected to have been known at this port. This applied to a consignment of rubber shipped for Holland on the Dutch steamer *Insulinde*. Rubber was declared conditional contraband on October 3, 1914, whilst this ship had sailed from her last port of departure (in this case, Port Said) on October 4, 1914, and the captain could not therefore be supposed to have known the relative declaration of contraband. The Court consequently applied Art. 43 of the Declaration of London, 1909.[1]

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[1] The *Sibilla*, February 14, 1916 (*Journal Officiel*, March 18, 1916, p. 2135). The same principles have been adopted by the English Prize Court in the case of the *Kim* (September 16, 1915).

[2] March 18, 1915 (*Journal Officiel*, June 8, 1915, p. 3721). The English Prize Court has similarly held that the rule of the Prize Court that property in goods is considered to be in the shipper until delivery, and that a sale *in transitu* is invalid, does not apply unless war is imminent and expected on the part of the vendor, and the sale is made to defeat the rights of belligerent captors. In this case, as war with Great Britain at time of sale was not regarded as imminent—in its proper meaning of " threatening or about to occur "—by the vendors, the sales were valid and the goods were not confiscable as prize: the *Southfield*, July 5, 15, 1915.

[3] July 15, 1915 (*Journal Officiel*, August 19, 1915, p. 5819).

(iii) When the restrictions imposed by neutral Governments on the exportation of certain goods from their territory exclude the possibility of articles of conditional contraband ultimately passing to an enemy State. This was the case of (*a*) a cargo of skins shipped for Italy on board the Italian steamer *Apollonia*, on bills of lading "to order." By referring to the two Decrees of the Italian Government of August 6 and November 13, 1914, prohibiting respectively the exportation of skins and hides from the Italian territory and the re-exportation of all goods shipped "to order" to an Italian port, the Court came to the conclusion that this cargo could not be re-exported from Italy and could not therefore be legally considered as contraband of war;[2] (*b*) a similar cargo on the Spanish steamer *Rioja* shipped from Spain to Switzerland, in transit through Italy. As the Swiss Federal Council had on October 20, 1914, forbidden, except by special authorisation, the exportation from Switzerland of all skins and hides, the Court held that there could not be a question of contraband of war in this case;[3] (*c*) a similar decision was given in the case of foodstuffs destined to Switzerland, the Swiss Federal Council having prohibited, by a Decree enacted on September 19, 1914, the export of foodstuffs from the Swiss territory.[4]

(iv) When the hostile destination is rendered improbable by the fact that the annual production of the enemy State exceeds by far the requirements of interior consumption. This presumption was applied to a cargo of salt, an article of the nature of conditional contraband, as it was established that Germany produces yearly a quantity of salt superior to the needs of her population.[5]

(v) In the case of goods seized before the publication of the German Regulations enforcing control of all foodstuffs. A consignment of flour for animal food had been shipped by an American company on board the Dutch steamer *Nieuw-Amsterdam* to its agents in Holland. Although at the time of decision of the Prize Court the German enactments above referred to had already been put into force, and these foodstuffs could consequently have been considered as contraband of war, the Court held that this treatment should not be made to apply to goods seized on September 2, 1914. Order was therefore given for the release of the goods, the consignees having engaged themselves to dispose of the cargo exclusively for local consumption in Holland, under the control of the French Consul at Amsterdam.[1]

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[1] March 15, 18, 1915 (*Journal Officiel*, June 4, 1915, p. 3600). The principle applied by the English Prize Court is that Art. 43 of the Declaration of London refers only to neutral cargo. Enemy cargo is subject to condemnation without compensation, although not declared contraband until after the vessel has sailed: the *Sorfareren*, October 25, 28, November 8, 1915.

[2] June 24, 1915 (*Journal Officiel*, July 12, 1915, p. 4740).

[3] October 28, 1915 (*ibid.* December 2, 1915, p. 8778).

[4] The *Sibilla*, December 6, 1915 (*ibid.* January 22, 1916, p. 593).

[5] The *Atlas*, May 4, 5, 1915 (*ibid.* June 12, 1915, p. 3849).

(vi) When it is established that the owners of the goods are non-enemy subjects. This right of ownership is admitted (*a*) if the claimants produce all the copies of the bills of lading covering the captured goods;[2] if not all the copies of the bills of lading, supplementary documents, such as invoices, insurance certificates or settled bills of exchange, are exhibited.[3]

(vii) As a general rule, conditional contraband was not condemned unless its ultimate destination to the armed forces or the Government department of the enemy State was proved. This principle is clearly evidenced in the decisions of the Court on the cargoes of the British steamer *Narrovian*, of the Dutch steamer *Kambangan*, and of the Spanish steamer *Beulliure*.[1]

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[1] February 18, 19, 1915 (*Journal Officiel*, April 21, 1915, p. 2458).

[2] Cargoes of rubber on the *Karimata*, June 24 and July 26, 1915 (*ibid.* July 11, p. 4717, and August 26, 1915, p. 5993).

[3] Cargoes on bills of lading, Nos. 9 to 14, etc., on the *Eir*, April 15, 16, 1915 (*ibid.* June 1, 1915, p. 3517). It will thus be seen that, according to the views of the French Prize Court, the right of property vests in the claimants who can produce sufficient documents justifying their claim, and no examination is made, for determining the passage of property, of the conditions stipulated in the contracts passed between vendors and purchasers, of the intentions of the parties or of the payment of the price. The system followed by the English Prize Court is to inquire into all these circumstances; this is shown in the cases of (*a*) the *Miramichi*, where it was held that the goods had not, at the time of seizure, passed to the buyers, but that the sellers had reserved a right of disposal or a *jus disponendi* over them, and that the goods still remained their property, and would so remain until the shipping documents had been tendered to and taken over by the buyers, and the bill of exchange for the price had been paid. In cases of seizure, the "ownership" of or "property" in a cargo shipped during peace depends upon the municipal law governing contracts for the sale and purchase of goods (November 23, 1914); (*b*) the *Parchim*, where it was laid down that no passage of property takes place until the documents have been accepted, and the price paid (October 25, November 1, 1915); (*c*) the *Kronprinzessin Cecilie*: *held*, that by the terms of business between the parties, the neutral shippers had not reserved any right of disposal of the goods after shipment; that the question whether the property had passed depended on the intention of the parties, and was a question of fact, and that consequently this property had passed to the enemy consignees, and was therefore an enemy property at the time of seizure (November 15, 18, 29, 1915).

(*b*) *Absolute Contraband.*—The essential distinction, as laid down by the Declaration of London of 1909, between absolute and conditional contraband is that articles constituting absolute contraband are liable to capture if it is only shown that they are destined to a territory belonging to or occupied by the enemy, without there being any necessity to establish, as in the case of conditional contraband, that the carriage of these goods did not entail any transhipment (doctrine of continuous voyage), or was in fact destined for the use of the armed forces or a Government department of the enemy State. But it must be admitted that one of the effects of the present war has been to minimise considerably the differences between these two classifications of contraband owing, in the first place, to the action of the German Government, and secondly, to the great facilities of transport by sea and by land which now exist, and as a result of which the right of a belligerent to capture conditional contraband would lose very much of its value if a mere consignment to a neutral port were sufficient to protect the goods. Every distinction, however, between absolute and conditional contraband has not entirely disappeared, and it would have been interesting to follow the applications which the French Prize Court has made of the rules relating to goods of absolute contraband, as compared with its decisions on cases of conditional contraband, if sufficient space were available, but only a few among the principal judgments given on articles of absolute contraband can be dealt with here.

A simple case was that of a cargo of tinplates (declared absolute contraband on January 3, 1915) seized March 14, 1915, on board the Italian steamer *Catania* and destined to a firm established on enemy territory (Beyrout). The prize was declared valid in virtue of Arts. 30 and 31 of the Declaration of London, 1909.[2]

In the more difficult cases, viz. where goods on the list of absolute contraband were addressed to neutral countries, the Court condemned such cargoes when a careful investigation of the facts resulted in a reasonable suspicion as to the ultimate destination of the goods, as in the following instances:

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[1] July 3, August 4, 1915, and February 28, 1916 (*Journal Officiel*, August 4, 1915, p. 5394; August 28, 1915, p. 6052; and March 29, 1916, p. 2524).

[2] December 13, 1915 (*ibid.* February 11, 1916, p. 1178).

(i) If the shippers' endeavours to conceal, by false appearances, the contents of the parcels of goods, confirm doubts as to their hostile destination. This was the case of a consignment of revolvers on board the Spanish steamer *Barcelo*, despatched from Spain to Switzerland, in transit through Italy, and found hidden in several post parcels.[1]

(ii) If the shipping documents give an untrue description of the real nature of the goods. A quantity of casks seized on the Spanish steamer *Rioja* were thus condemned, as they were described by the bills of lading as containing liquid black colour, but were found after examination to contain terebinthine essence.[2]

(iii) If the goods are to be delivered to a company established on neutral territory, but sent from the chief office situated on enemy territory. This applied to the cargo of the Greek steamer *Achilleus* despatched to the Swiss branch of a German firm, and when it was further notorious that this firm was carrying on business directly with the German Government.[3]

(iv) If the shipping documents have not all been produced, and no claim for the release of the goods has been entered. A consignment of hides (declared absolute contraband on March 12, 1915), shipped from Spain to Italy on the Italian steamer *Sibilla* was seized April 2, 1915. The prize was declared lawful as one copy only of the bills of lading was found on board, the remaining three other copies were not produced, and no claim was filed by the consignees.[4]

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[1] July 20, 1915 (*Journal Officiel*, August 22, 1915, p. 5913). Compare the principles held by the English Prize Court in the *Kim* and the *Fridland* (September 16, 1915): "Any concealment or misdescription, or device calculated and intended by neutrals to deceive and to hamper belligerents in their undoubted rights of search for contraband, will weigh heavily against those adopting such courses when any presumptions or inferences have to be drawn."

[2] September 28, 1915 (*Journal Officiel*, December 1, 1915, p. 8746).

[3] October 28, 1915 (*ibid.* November 28, p. 8658). It has been also ruled by the English Prize Court that an enemy company, incorporated or resident in enemy territory, is of an enemy national character, notwithstanding its international position due to the fact that most of its shares are held by incorporated companies of nations which are not enemies (the *Roumanian*, December 7, 1914), and that the property of an enemy subject who is domiciled in an enemy country, but has a house of trade in a neutral country, is treated as enemy property (the *Clan Grant*, March 16, 1915). Compare also the *Eumæus*, November 4, 22, 1915.

[4] December 6, 1915 (*Journal Officiel*, January 22, 1916, p. 593).

III. Various Points of Prize Law.

Personal Effects.—In all cases of condemnation of ships, an exception was invariably made in favour of all objects found on board and constituting the personal property of the captain and crew, by the Court issuing an order that these objects should be left to their owners or be restored to them if they had been withdrawn from the ship.[1] Contraband of war was, however, expressly excluded from this favourable treatment.[2] In instances where the enemy ship having been destroyed, the personal objects of the master and the crew had likewise perished, the Court ruled that no indemnity or compensation was due by the captor to the owners if the destruction of the vessel had been legally and validly effected.[3]

Right to Freight.—The Court admitted its jurisdiction on all claims made by the shipowners or the ship-charterers for the recovery of the unpaid freight, and based its decision on the ground that the loss of the freight was not the consequence of the detention of the vessel, but of the seizure of the goods.[4] In cases where the capture of the cargo was declared null and void, the Court ruled that the shipowners could exercise their action directly against the proprietors of the goods in any legal manner at their disposal and especially by entering an objection to the release of the goods or the proceeds of the sale before their claim for the freight due had been settled.[5] In cases where the capture of the goods was declared good and valid, the Court held that the shipowners, to whom no fault could be imputed for the despatch of the contraband of war, had the right to claim payment of the freight from the Marine Minister by establishing before him that they had not yet received, in any way whatever, this freight and by justifying as to the exact amount of such freight up to the port where the unloading of the cargo took place (as on *a quantum meruit* and *pro rata itineris*).[6] Interest on the freight due was even allowed from the time of seizure and for a period of two months after notification to the parties interested of the Court's judgment, in cases where the seizure of the goods had been wrongfully made.[1]

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[1] The *Porto*, the *Persepolis*, November 10, 1914, and January 31, 1916 (*Journal Officiel*, March 30, 1915, p. 1732, and March 13, 1916, p. 2018).

[2] The *Dacia*, August 4, 1915 (*ibid.*, August 26, 1915, p. 5994).

[3] The *Mahrousseh*, November 8, 1915 (*ibid.* December 17, 1915, p. 9272).

[4] The *Atlas*, May 4, 5, 1915 (*ibid.* June 12, 1915, p. 3851).

[5] The *Jiul*, March 18, 1915 (*ibid.* June 8, 1915, p. 3722).

[6] The *Fortuna*, May 11, 12, 1915 (*ibid.* June 14, 1915, p. 3903).

Right to Interest.—In instances where the capture of the cargo was declared null, and the goods having been sold, under imperative circumstances, by the captor, no order for release of the goods could be given, but only payment of the proceeds of the sale was granted, the Court decreed that the captor was bound to pay to the owner of the cargo interest from the date of the claimant's appearance to the date of the payment of the proceeds of the sale, such interest to be computed at the legal rate fixed by Art. 1153 of the French Civil Code, and by the law dated April 7, 1900.[2]

Claims for interest were, however, refused in the case of goods shipped on board enemy ships, as a presumption was thereby raised that they were enemy property,[3] and when the seizure was sufficiently justified by the irregularity of the ship's papers found on board.[4]

Right to Damages.—As regards captures of goods figuring on the list of conditional contraband, seized on neutral vessels, and released by the Court's order, all claims for damages resulting from the seizure of the cargoes and the delays caused thereby to their consignees were rejected, as it was held that conditional contraband sailing under a neutral flag is subject to seizure by the belligerents for the object of determining its real destination.[1]

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[1] The *Oranje Nassau*, July 19, 1915 (*Journal Officiel*, August 19, 1915, p. 5819). The question as to the right to freight came before the English Prize Court for decision for the first time in the case of the *Juno* (December 14, 1914), where the principle was laid down that such a sum is to be allowed to the shipowners on freight as is fair and reasonable in all the circumstances, regard being had to the rate of freight originally agreed (although this is not necessarily conclusive in all cases), to the extent to which the voyage has been made, to the labour and cost expended, or any special charges incurred in respect of the cargo seized before its seizure, and to the benefit accruing to the cargo from the carriage on the voyage up to the seizure; but no sum is to be allowed in respect of any inconveniences or delay attributable to the state of war, or to the consequent detention and seizure. This practice of the Court has been confirmed in the cases of (i) the *Katwyk* (May 17, 1915): *held*, that as company was innocent when the vessel started on her voyage, her owners, notwithstanding the fact that they might have business relationship with an enemy company, were entitled to some freight in accordance with the principles laid down in the *Juno*; (ii) the *Iolo* (June 3, 7, 1915): *held*, that when a cargo or the proceeds of the sale are released, shipowners are entitled to such a sum out of the proceeds for freight as is fair and reasonable in the circumstances, to be calculated as in the *Juno*; (iii) the *Manningtry* (October 12, 1915): *held*, that when a freight had been paid innocently in ignorance of the fact that cargo had been seized as prize, the sum so paid shall be reimbursed to the claimants out of the proceeds of sale of the condemned cargo. But the claim of the shipowners to freight was disallowed in the case of the *Parchim* (October 25, November 1, 1915), as the vessel was employed in an illegal trade.

[2] The *Apollonia*, June 24, 1915 (*Journal Officiel*, July 12, 1915, p. 4740).

[3] The *Czar Nicolai II.*, July 26, 1915 (*ibid.* August 23, 1915, p. 5932).

[4] The *Beulliure*, February 28, 1916 (*ibid.* March 29, 1916, p. 2524).

As regards, on the other hand, any action brought by the shipowners for the award of damages resulting from the diversion or detention of neutral ships for the purpose of seizing and making examination of suspected cargoes, the Court ruled that a Prize Court cannot decide on any similar claim except accessorily to a judgment on the validity of the ship's seizure, and that in all cases where a vessel is not captured, but only detained provisionally for the object of discharging certain goods and is then left at liberty to pursue her voyage, the Court has no jurisdiction to issue any decree as to damages or costs.[2]

Liens on Prizes.—In the case of the steamer *Colonia* condemned as lawful prize, the Court admitted the intervention of a French banking company on its showing, as a creditor of the enemy shipowners, a sufficient interest in the prize.[3] But in cases of condemned cargoes, the Court laid down the rule that a person of non-enemy nationality is not entitled, in the absence of any claim from the real consignee of the goods, to set up a lien on the cargo, and make it escape capture, if he simply alleges, as a support to his claim, that he has made advances of money on the goods and is thus the mortgagee of the captured cargo.[4]

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[1] The *Nieuw-Amsterdam*, February 18, 19, 1915 (*Journal Officiel*, April 21, 1915, p. 2458).

[2] The *Insulinde*, March 15, 18, 1915 (*ibid.* June 4, 1915, p. 3600). It has been also held by the English Prize Court that no sum ought to be allowed, unless there be some special and exceptional circumstance, in respect of any delay or inconvenience which may occur to a ship as the necessary result of her diversion or detention for the purpose of seizing and making examination of confiscable enemy cargo: *Juno* (December, 14 1914). Compare also the decisions of the *Katwyk* and the *Tredegar Hall* (May 17 and September 9, 1915), disallowing all claims of shipowners for demurrage or detention.

[3] May 18, 19, 1915 (*Journal Officiel*, June 15, 1915, p. 3952).

[4] The *Eir*, April 16, 1915 (*ibid.* June 1, 1915, p. 3517). Sir S. Evans's judgments on the question of liens are almost analogous. His Lordship ruled that " upon authority and principle, no liens against ships or cargoes can be allowed. To accede to these claims, is to open a door for all sorts of inquiries and calculations which has been consistently and firmly closed by my predecessors and by Courts of Prize. In my judgment, the only safe guiding principle is to ascertain who are the legal owners of the cargoes ; and, if the goods are found to be the property in law of an enemy, to

Transfers of Ownership.—It was held that all transfers of the right of ownership or disposal of goods effected after their seizure are not admissible by the belligerent captor, and must be disregarded. This was the case of the cargo covered by bill of lading No. 7 on board the Norwegian steamer *Eir* and claimed by a company of Dutch bankers on the ground of their being the owners of the goods, when it was established that the transfer of ownership had been perfected between the parties twenty-two days after the seizure of the cargo.[1]

Destruction of Prizes.—The principle adopted by the French Prize Court is that the destruction of an enemy ship (no case of destruction of neutral prizes has up to now occurred) is valid if it has been justified by imperative circumstances. The right to destroy an enemy vessel was therefore deemed by the Court to have been sufficiently warranted (i) if the preservation of the prize would have compromised the success of the operations in which the capturing cruiser was engaged; [2] (ii) when it was impossible, owing to the unfavourable state of the sea and the stress of the weather, to tow or convoy the prize; [3] (iii) when the prize could not be navigated on account of her unseaworthy condition and as being too old; [4] (iv) as a general rule, if justified by the military necessities of the captors.[5]

The same rules were applied to the destruction of cargoes constituting absolute contraband. A cargo of tinplates on board the Italian steamer *Catania* was declared by the Court to have been validly and lawfully destroyed, as it was established that this destruction had been rendered imperative by the naval operations of the capturing men-of-war.[6]

Appearance of an Alien Enemy.—The question of allowing an

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condemn them; or if they are the property of neutrals or British subjects, to release them": the *Odessa*, the *Cape Corso* (December 21, 1914). But the Crown, being entitled to captured property, may out of its bounty deal favourably with any such claims: the *Marie Glaeser* (September 16, 1914).

[1] April 15, 16, 1915 (*Journal Officiel*, June 1, 1915, p. 3517). The English Prize Court in the case of the *Parchim* (October 25, November 1, 1915) has equally held that if the property on the goods did not pass on shipment, it could not pass afterwards, so as to defeat the rights of belligerents.

[2] The *Mahrousseh*, November 8, 1915 (*Journal Officiel*, December 17, 1915, p. 9272).

[3] The *Jabr-el-Kavater*, November 15, 1915 (*ibid.* January 4, 1916, p. 79).

[4] The *Cheref*, November 29, 1915 (*ibid.* January 9, 1916, p. 231).

[5] The *Sélimié*, January 31, 1916 (*ibid.* March 13, 1916, p. 2018).

[6] December 13, 1915 (*ibid.* February 11, 1916, p. 1178).

alien enemy to appear before the Court, through his counsel, in order to uphold and defend the rights to which he believes himself to be entitled, was resolved in the affirmative in the case of the German steamer *Czar Nicolai II.*, its owners having been granted leave to enter an appearance.[1]

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[1] December 8, 1914 (*ibid.* April 19, 1915, p. 2369). The English Prize Court had already some time before admitted the right of an alien enemy to appear before the Court as a claimant in order to argue his claim (the *Möwe*, November 9, 1914). The President, Sir S. Evans, ruled that "the practice of the Court shall be that whenever an alien enemy conceives that he is entitled to any protection, privilege, or relief under any of The Hague Conventions of 1907, he shall be entitled to appear as a claimant, and to argue his claim before this Court. The grounds of his claim should be stated in the affidavit to lead to appearance."

A DEFENCE OF ROUSSEAU'S THEORY OF THE SOCIAL CONTRACT.[1]

[*Contributed by* W. BLAKE ODGERS, ESQ., K.C., LL.D.]

The "Contrat Social."—The great success which this book achieved was due to many causes. But they may be all summed up in one sentence—the times were ripe for just such a book, and Rousseau was just the man to write it. He had walked on foot along the byways of provincial France, as Cobbett later rode through the English lanes; and he knew well how the peasants were ground down, and to what abominations they had to submit. He knew too that the nobles paid no taxes, that the clergy paid no taxes, that all the money required by the Government was ground out of the peasants, and then largely misappropriated by corrupt *fermiers* and the remainder spent in vice by dissolute courtiers. It was this knowledge that inspired those bursts of real eloquence which startle us in the midst of philosophic argument like a thunderbolt from a clear sky.

Moreover Rousseau's intellect was keen and clear, his language simple, his French excellent, and his style forcible and crisp. Each sentence rings like the crack of a whip. He first states his propositions in brief terse axioms, and then proceeds to prove them. He enunciates startling paradoxes, which yet contain the kernel of a truth. What could be neater or completer, from the point of view merely of language and style, than the opening sentence: "L'homme est né libre, et partout il est dans les fers"? How it at once arrests the attention of the reader and brings him up with a start! He says to himself in the first place: "That is very neatly expressed," and then, "It is very sad if it is true." Of course neither limb of the sentence was strictly true. Not all men were born free when Rousseau wrote, any more than they were when Ulpian made the same assertion. Nor were Englishmen, Welshmen, and Scotchmen "in chains" in the year 1762.

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[1] A portion of a course of lectures to be delivered on the life and works of Rousseau.

But a writer on a subject which would generally be regarded as dull may be permitted to indulge occasionally in a striking paradox in order to compel attention—even though he will no doubt be compelled to modify it in some later sentence. The pity of it is, however, that the striking paradox is remembered and repeated while the subsequent modification is overlooked. This is why Rousseau has been so frequently misunderstood. This explains also why in later days it was often possible for each of two contending parties to assert that he was on its side. Both in 1789 and 1792 the cry of every one was "comme l'a dit Jean Jacques." Dussault indeed declared that Rousseau towards the end of his life once said to him: "Ceux qui se vantent d'entendre le *Contrat* tout entier sont plus habiles que moi." But then we must remember that when Browning was asked for an authoritative declaration of the true meaning of his poem "Childe Roland to the Dark Tower came," he replied that it meant nothing; although the meaning is there, clear and satisfactory, and easily to be discovered by any one who will read the poem through twice.

Popularity of the Book.—Then again the book was short as well as clear. It is only one-sixth of the length of Montesquieu's *Esprit des Lois;* and this brevity no doubt increased the sale, and so the influence of the book. It commences with the briefest Preface and the briefest Introduction that I have ever seen in any work on political science. And in the Introduction the author gives us an excellent reason why men should read his book: "The fact that I have a right to vote on public affairs is in itself sufficient to make it my duty to study them" (Le droit d'y voter suffit pour m'imposer le devoir de m'en instruire). And he encourages his readers to perform this duty by adding his own experience as to the result of such a study—an experience which we do not all share: "Heureux, toutes les fois que je médite sur les gouvernements, de trouver toujours dans mes recherches de nouvelles raisons d'aimer celui de mon pays."

There were two other matters, each of which gave Rousseau an advantage over his contemporaries and greatly helped him in writing this book. In the first place, he was born and bred in a free Republic. Geneva was, it is true, a very small State, but

Rousseau believed in small States. Any one who reads the Dedication prefixed to his second *Discourse* will realise how deeply Rousseau loved Geneva. And in the Introduction to the *Contrat Social* he proudly declares that he was " né citoyen d'un État libre, et membre du souverain."

In the second place, Rousseau thoroughly knew and believed in the Bible. The other Encyclopædists refused to study the early history of the Jews owing to the prejudices of the time, and further they declined to accept the Old Testament as an authentic record of that history. Some of them even denounced the Pentateuch as " a gratuitous forgery executed after the return from the Captivity." But Rousseau was nurtured in a very different school. He was a member of an ancient Huguenot family; his ancestor Didier Rousseau fled from France to Geneva in 1529 because of his Protestant opinions. Jean Jacques' mother was the daughter of a Calvinistic minister in Geneva. When his father deserted him in 1722, he was brought up by his mother's family, who were strict Protestants. They placed him under the care of M. Lambercier, the pastor of Bossey, who, we may be sure, did his best to instil a thorough knowledge of the Bible into his pupils.

The Value of the Hebrew Scriptures.—It has always surprised me that my colleagues who write on primitive law do not devote more time and attention to the study of the Bible. The late master of my college would, I think, have found in the Hebrew Scriptures much to help him in his works on Ancient Law and Village Communities. Had he been living now, he would, I am sure, have read with great interest the *Code of Laws* promulgated by Hammurabi, King of Babylon, about 2250 B.C.[1] Valuable information might also probably be obtained from what is believed to be the oldest complete book in the world, the *Instruction of Ptah-Hotep*, which learned men have now decided to have been written about 3500 B.C. Rousseau at all events carefully studied the most ancient writings within his reach; he tells us that he read the Bible through from cover to cover five or six times. And the knowledge which he thus obtained often places him in a position superior to his contemporaries. See, for instance, the argument which in his chapter on " Religion " he bases on Jephtha's speech to the Ammonites admitting their title to the lands which their god Chemosh had given them.[1] And note that Rousseau quotes from the Vulgate, and has detected that in the French version of the Old Testament the words "according to you" had been inserted, which are not in the Vulgate.

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[1] See *The Oldest Code of Laws in the World*, translated by C. H. W. Johns, D.D., Master of St. Catherine's College, Cambridge. This Hammurabi has been identified with the Amraphel, King of Shinar, mentioned in Gen. xiv. 1.

The Formation of the State.—Those who read the *Contrat Social* when it first appeared discovered no doubt a considerable alteration in some of Rousseau's opinions. For instance, he does not in this volume maintain that the primitive man was a model of all manly virtues. His earlier *Discourses* were individualistic in the extreme. But the latter part at all events of the *Contrat Social* tends distinctly towards collectivism, and so do his later writings on political subjects. He had by this time escaped from the influence of the abstract *à priori* theories of the individualistic school. This change was largely due to his practical experience of life and to his own observation of actual political facts; though doubtless the publication in 1748 of Montesquieu's *L'Esprit des Lois* had a considerable share in his partial conversion—for it was but partial—to collectivism.[2]

The Law of Nature.—Writers who theorise about the primitive man often base their conclusions on the so-called "Law of Nature." There never was such a thing as the law of nature in any sense of the word "law" in which a practising lawyer would use that word. It is just a convenient and very elastic term which is sometimes used as identical with the law of God or conscience, or "natural justice," while at other times it seems to denote little more than savage customs or animal instincts. But wherever this law of nature prevails, every man is his own master; he has no rights and no one has any rights over him; all men are equal. Each man is an individual and is individualistic. And yet they were all supposed to be perfectly happy.

The Origin of Nations.—But when the curtain rises on historic man, we find nothing of this sort anywhere on the face of the globe. We find instead a large number of small communities, each governed by its own king or other ruler. This was so when Abraham and Lot entered Palestine, when the Greeks marched against Troy, when Romulus built the walls of Rome, and when Cæsar conquered Gaul.

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[1] Judges xi. 24.

[2] This matter is fully discussed in Dr. Vaughan's excellent edition of Rousseau's *Political Writings* recently issued by the Cambridge University Press.

How did the hypothetical primitive individuals come to be united into such communities? And why did these free and happy beings ever place themselves under the rule of a despot? We know that "God setteth the solitary in families,"[1] but who setteth the families in nations? This is the first question which Rousseau lays before the readers of his *Contrat Social.*

To this question, at least four different answers had already been suggested:

(i) Some nations were so delighted with the form of government under which they lived, that they deemed its origin super-human. Thus, the earlier Greek poets and philosophers asserted that their laws and their constitution came down from heaven. Demosthenes even went so far as to assert that "Every law is a gift of God"; he would not say so now. Other nations, however, found themselves living under institutions which were not at all to their liking; they therefore sighed for a state of nature, for the Isles of the Blest, or other Utopias. These they deemed to have been the gift of the gods to primitive men whose descendants foolishly abandoned them for defective institutions of their own. Thus that somewhat doleful preacher, the author of Ecclesiastes, writes: "Lo, this only have I found, that God hath made man upright; but they have sought out many inventions."[2]

(ii) Next, it has been said that man is by nature a gregarious animal; and that it was instinct that drew men together into societies. There may be truth in this suggestion; but if so, the instinct would have operated at once. In other words, the individualism of the primitive man would only have lasted till the moment when he first met a fellow-creature!

(iii) Then there is the Patriarchal theory—that the whole nation is lineally descended from some ancient common ancestor, and that the eldest son of the eldest son of the eldest son . . . of that ancestor is king of the whole nation by right of birth. This would mean that the whole nation consisted of the royal family! But, so far as I am aware, it cannot be proved in the case of any nation that there was in fact any such common ancestor. I doubt if even the "children of Israel" were all descended from Jacob—at all events in the days of David and Solomon. And the principle of primogeniture did not flourish among early nations in the strict way suggested above. Alfred the Great was not heir to the throne of Wessex; the Saxons took the strongest and the bravest member of the royal family to be their king, although Alfred's elder brother had left a son.

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[1] Psa. lxviii. 6.

[2] Eccles. vii. 29.

(iv) Then it has been said that nations are formed by war. But this cannot be so in the case of a primitive community. The earliest communities may possibly have been formed with a view to carrying on war, or with the object of defending themselves against war, but they could not have been created by war. The community must have existed before it could go to war.

Rousseau's Theory of the Origin of Nations.—But Rousseau brushes all these antecedent theories aside and relies solely on a suggestion of his own:

> The social order is a sacred right which is the basis of all other rights. Yet this right does not come from nature, and must therefore be founded on *conventions*. . . . We must always go back to a first convention. . . . Let us assume (*Je suppose*) that men have reached a point at which the obstacles in the way of their preservation in the state of nature are stronger than any single individual can resist. They can no longer subsist in their primitive condition, and the human race will perish unless it changes its manner of existence. . . . In every state there must be agreements to combine rights and duties, and to enable justice to attain its aim. . . . "The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and *remain as free as before*." This is the fundamental problem of which the *Social Contract* provides the solution.

Rousseau uses the term "convention" in a very wide sense; he includes in it tacit agreements and those which can only be inferred from conduct or compliance. If we also use the term in this wide sense, then he is probably right in saying that it was some such *pacte social* which bound primitive men together and formed them into communities or states. He is probably right also in saying that the motive which compelled them to enter into such a *pacte* was, in most cases, self-preservation. They found that as isolated individuals they could not successfully resist their foes; they had discovered that union is strength. It is not fair to ask Rousseau in what place and at what date his alleged convention was made; still less to expect him to set out its terms in detail. In those early times one would not expect such conventions to be formally enunciated. But, as he tells us in Chapter VI.: " Bien qu'elles n'aient peut-être jamais été formellement énoncées, elles sont partout les mêmes, partout tacitement admises et reconnues."

The General Will.—As soon as individuals have entered into a " social contract," in Rousseau's sense of the term, they become a political community, a body politic—that is, an entity distinct from the individuals which compose it. It has a corporate self (*moi commun*) and possesses opinions which are its General Will (*volonté générale*); and the General Will expresses itself in laws or ordinances. The General Will then is the manifestation of the mind of the new community. And as the social contract which created that new community placed each member of it under the absolute control of the whole body, it made the General Will sovereign and the only sovereign.

But this social contract of Rousseau's must not be confused with the social contract of which we read so much in the works of other writers. That is a social contract made between an already existing community and its king or other governor. This is an entirely different contract. They no longer believed that a king had any divine right to govern a nation; they traced whatever right he had to a contract which they assumed to have been made by that nation with him or his ancestors long ago. But Rousseau's scheme of the history of a nation involves two wholly separate and independent contracts. First there is the original, constituent contract under which several families of the same race united themselves into a tribe, or several tribes united themselves into a nation. In making such a contract as this, every individual member of the future state contracts with all the other members. There is not yet any king or any governor. A contract with one or other of these officials emerges at a later date, and it is a contract between that official and the already constituted political entity. Thus we see clearly that according to Rousseau the people is first established and clothed in all the majesty of its General Will. Then it deigns to take into its employment a prince or a prime minister.

Biblical Origin of Rousseau's Theories.—I believe that it was from the Bible that Rousseau derived his clear conception of these two distinct contracts. The children of Israel were a nation before they entered the land of Canaan, and during the first centuries of their residence there they were occasionally governed, more or less, by priests and priestesses, and heroes such as Gideon and Samson, who were all disconnected personages. But " it came to pass when Samuel was old that . . . all the elders of Israel gathered themselves together, and came to Samuel unto Ramah, and said unto him, Behold thou art old, and thy sons walk not in thy ways: now make us a king to judge us like all the nations. But the thing displeased Samuel." He urged them not to take this step; he warned them that Jehovah would regard it as a rejection of Himself; he told them of the sufferings which they would endure at the hands of a king. " Nevertheless the people refused to obey the voice of Samuel; and they said, Nay; but we will have a king over us." [1]

Here is a forcible expression of the General Will of an already constituted nation, and it appears to be unanimous. So Samuel had to find them a king; he selected Saul. Then he " called the people together unto the Lord to Mizpeh," and they presented themselves there by their tribes and by their thousands, and Saul was subsequently chosen over again by a more public process. He could not at first be found, for he had " hidden himself among the stuff. And they ran and fetched him thence . . . and Samuel said to all people, See ye him whom the Lord hath chosen, that there is none like him among all the people? And all the people shouted, and said, God save the king." [2] Here in the simplest possible language we have the second contract by which a nation, in pursuance of its General Will, appoints one of themselves to be their king.

The Tyranny of the General Will.—But it has been objected: Did not Rousseau promise [3] us that in an association established under a social contract each associate, while uniting himself with all, may still obey himself alone, and remain as free as of old? Before the social contract *ex hypothesi* all the members of the nascent community were free and equal; after the social contract they were perhaps still equal, but surely they were no longer free. How can they be termed free, when the General Will is sovereign over them all? There must have been always a minority, who opposed the majority, but opposed it unsuccessfully, and yet would be compelled to obey the decision of the majority against their own will and judgment. How can they be said to be as free as before when they were under the tyranny of the General Will? And the General Will could not have been always right. Rousseau might have replied to this contention by saying that there very seldom was a minority; and it is marvellous how frequently in ancient times the people were unanimous in their decisions—*e.g.* when in the first book of the Iliad all the Argives shouted for an immediate return to Hellas, and rushed for their ships, or when at Ramah all the people of Israel said "Nay; but we will have a king over us." But Rousseau prefers to put the question aside by one of his usual paradoxes:—"Quiconque refusera d'obéir à la volonté générale y sera constraint par tout le corps; on le forcera d'être libre!"

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[1] See 1 Sam. viii. 1–19.

[2] 1 Sam x. 23, 24. A much more detailed account of the election and duty of a king of Israel will be found in the Book of Deuteronomy xvii. 14–17; here the appointment is made subject to many wise provisions.

[3] See *supra*, p. 327.

But I venture to assert without any paradox that if we accept Rousseau's hypotheses, the men who enter into a social contract still remain free. A man does not cease to be free because he is bound by a convention into which he has freely entered. As Wordsworth says:—

> In truth, the prison, unto which we doom
> Ourselves, no prison is.

The same rule applies in more modern politics. Whenever substantially the whole of the members of a community, whether male or female, have an equal share, and a reasonably efficient share, in framing the laws by which they are to be bound, that community is free; and its members are none the less free because they will be compelled to obey the laws so framed. They may obey and yet be free. Must we look only to the future for the day promised to us by W. M. W. Call, when

> A nobler order yet shall be
>   Than any that the world hath known,
> When men obey and yet are free,
>   Are loved and yet can stand alone?

Is there no nation on the face of the earth which has already attained to this perfection?

The Religion of the Individual and the Religion of the State.—It is not true that Rousseau was irreligious. In his youth, no doubt, his morality left much to deplore, but he was always a man of deep religious feeling. He disagreed almost as heartily with the doctrines of the Calvinistic Church of Geneva as he did with the creed of the Church of Rome. But, in the broadest sense of the term, he was a Christian.

> "There remains," he says, "the religion of the man, or Christianity—not the Christianity of to-day" (*i.e.* of a hundred and fifty years ago), "but that of the Gospel, which is entirely different. By means of this religion, holy, sublime, and true, all men, being children of one God, recognise one another as brothers, and the society that unites them is not dissolved even at death."

Rousseau divides religion, when considered in relation to society, "into two kinds; the religion of the man and that of the citizen. The first, which has neither temples, nor altars, nor rites, and is confined to the purely internal worship of the supreme God and the eternal obligations of morality, is the religion of the Gospel pure and simple, the true theism." The religion of the citizen, on the other hand, is that which his particular State calls upon him, as a good citizen, to adopt;

> it has its dogmas, its rites, and its external cult, which are prescribed by law. It matters very much to the community that each citizen should have a religion. That will make him love his duty; but the dogmas of his religion concern the State and its members only so far as they have reference to morality, and to the duties which each citizen owes to others. . . . Now that there is and can be no longer an exclusive, national religion, tolerance should be given to all religions that tolerate others, so long as their dogmas contain nothing contrary to the duties of citizenship. . . . There should therefore be a purely civil profession of faith of which the sovereign should fix the articles, not exactly as religious dogmas, but as social sentiments without which a man cannot be a good citizen or a faithful subject. While the sovereign can compel no one to believe them, he can banish from the State whoever does not believe them—not for impiety, but as an anti-social being, incapable of truly loving the laws and justice.
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> The dogmas of civil religion ought to be few, simple, and exactly worded, without explanation or commentary. The existence of a mighty, intelligent, and beneficent God, possessed of foresight and providence; the life to come; the happiness of the just; the punishment of the wicked; the sanctity of the social contract and the laws; these are its positive dogmas. . . . Each man may have, over and above, what

opinions he pleases, without it being the sovereign's business to take cognisance of them ; for, as the sovereign has no authority in the other world, whatever the lot of his subjects may be in the life to come, that is not his business, provided they are good citizens in this life.

Once more I call attention to the benefit which Rousseau derived from his careful study of the Bible. Turn to the fifth chapter of the second book of Kings—the chapter which all children love, because it contains the story of Naaman the leper. When he was cleansed of his leprosy, he returned to the man of God and said, " Behold, now I know that there is no God in all the earth, but in Israel : shall there not then, I pray thee, be given to thy servant two mules' burden of earth ? for thy servant will henceforth offer neither burnt-offering nor sacrifice unto other gods, but unto the Lord." He intended no doubt to lay this earth down on some portion of his estate, and thereon to erect a private temple to Jehovah. He imagined, it would seem, that Jehovah could not see a Syrian or listen to his prayers, unless he stood upon a portion of the soil of Canaan. But now comes this remarkable request to Elisha : " In this thing the Lord pardon thy servant, that when my master goeth into the house of Rimmon to worship there, and he leaneth on my hand, and I bow down myself in the house of Rimmon, the Lord pardon thy servant in this thing. And he said unto him, Go in peace." Though convinced that the God of Israel is the only God, yet, being captain of the host of the King of Syria, Naaman is permitted on state occasions to bow down his head in the house of the God of the State. This is the Occasional Conformity which Defoe so sternly denounced in 1697 and again in 1701. But is it not also a clear instance of Rousseau's distinction between the religion of the State and the religion of the individual ? Where else could Rousseau find justification for his suggestion that a conscientious man may lawfully conform to the worship prescribed by his State, to the extent even of pretending in public to accept doctrines which, in private, he disavows ?

ABSENT VOTING.

[*Contributed by* DUNCAN CAMPBELL LEE, ESQ.]

ABSENT voting is the name applied to the system or systems by which provision is made for participation in elections on the part of voters who are unable to be at their homes on the day of polling. In particular it has been rendered necessary by the conditions of life in Australasia and some parts of the United States. More recently the absence of large numbers of men from their homes on active service has led to the passing of emergency laws in New Zealand in 1914 and in Canada in 1915, which make voting possible for members of the Expeditionary Forces during the present war.

Methods of Voting.—The methods employed to secure franchise privileges to absent voters are not uniform in these various states. The ideas or principles lying at the bottom of the several systems may be roughly classified as follows:

A. Depositing one's Ballot away from Home.—Under a system having this characteristic, the elector may vote at any polling-place he pleases throughout the state. The various laws modelled on this principle naturally divide themselves into three classes:

(*x*) Where the elector does not obtain in advance from the election officials at his home any authorisation to vote, but assumes responsibility for himself under oath (*e.g.* Missouri).

(*y*) Where the elector obtains in advance an authorisation from his home election officials and presents this authorisation to the polling officials as a certificate of his right to vote (*e.g.* Australia).

(*z*) Where the elector obtains in advance an authorisation from his home election officials, but before he can vote he must be identified by two qualified voters of the place where he proposes to cast his ballot (*e.g.* Minnesota).

B. Voting by Post.—Under this scheme a special ballot is obtained from home on application and the absent voter makes affidavit and himself posts his ballot to the home election officials (*e.g.* North Dakota); or a ballot is furnished by the home official on application, and the person before whom the law authorises the voter to prepare his ballot posts the ballot on behalf of the voter to the returning officer of the division of which the voter is an elector (*e.g.* Australia).

C. Voting in Advance of Polling-day.—By this plan, the absent voter's ballot must reach the home officials in time to be counted at the close of the poll (*e.g.* North Dakota and Australia; also the war legislation of New Zealand and Canada).

D. Voting on Polling-day.—The absent voter's ballot is deposited at any polling-place on the day fixed for the election, and is forwarded in due course to the home election official or returning officer, and is counted as a part of the returns at an official canvass by county commissioners held a few days after the polling-day (*e.g.* Kansas and other of the United States).

E. Voting by Soldiers in Groups.—Where companies of soldiers are enlisted from a single division or a single state, as was the case during the American Civil War.

F. Voting by Detached Soldiers.—As distinguished from the foregoing.

G. Emergency Legislation in New Zealand and Canada.—Soldier-votes are deposited with specially appointed electoral officials.

Voting in the American Army during the Civil War.—The methods employed during the Civil War in America to record the votes of soldiers on actual service, to which *E* and *F* in the above classification apply, are of peculiar interest at the present time when so large a number of voters are out of their home countries, or at least away from home, on war service.

No less than fourteen loyal states authorised their soldiers in the field to vote in the presidential election of 1864. The system gave general satisfaction. Under the various laws, which provided for voting in the field, 154,045 votes were cast, of which Lincoln received 119,754, and his opponent 34,291.[1]

The organisation of the Northern armies during this war was by states. Every soldier of the Federal forces was first enlisted as a member of the militia of his home state, and as soon as regiments were formed and trained, they were drafted into the national service. Each regiment was composed of men from a single state. It was an easy matter, therefore, to arrange that in these state regiments a poll or polls should be opened. As a matter of fact, polls were opened in each company, at the captain's headquarters. The result was duly notified to the proper officials in the state from which the regiment was enlisted.

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[1] Greeley's *American Conflict*, vol. ii. p. 672.

The law enacted by the State of Pennsylvania on August 25, 1864, may be taken as a good type of these laws, although it must be understood that the details of the legislation were not uniform in the states.[1]

The law begins:

> Whenever any of the qualified electors of this commonwealth shall be in any actual military service under a requisition from the President of the United States, or by authority of this commonwealth, and as such absent from their place of residence, on the days appointed by law for holding the general or presidential elections within the state, such electors shall be entitled to exercise the right of suffrage as fully as if they were present at their usual places of election. A poll shall be opened in each company composed in whole or in part of Pennsylvania soldiers at the quarters of the captain.

It was also provided that when ten or more voters at any place were unable to attend any company poll, the electors present might open a poll; three qualified electors present should be elected judges of the election; and all election officers should take the oath. For each company or separate group there was furnished a poll-book which was transmitted to the prothonotary of the court of common pleas of the county in which the electors would have voted. The returning officers were required to postpone the final count until the third Friday following the general election, and were required to include in their enumeration the soldier-vote. No mere informality was allowed to invalidate the election.

Election by Detached Voters in the Army of the United States.—A very large number of soldiers in the Northern armies, however, sent their ballots home separately to be cast by their near friends. This plan was largely followed among the volunteers from New York State and Pennsylvania, and is to be found set out in detail in the Pennsylvania Act above noted. Whenever less than ten soldiers were separated from their proper company, whether within or without the state, in circumstances that made it probable that they would be unable to join their proper company in time to vote on the day of election, they were not to lose their privilege of voting, if they wished to exercise it.

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[1] See Brightly Purdon's *Digest of the Laws of Pennsylvania*, vol. i. p. 663, s. 99.

The voter was authorised before the day of election to deposit his ballot or ballots properly folded as required by the general election laws of the state in a sealed envelope, together with a statement containing the name of the voter and his polling district and a written or printed authority to some qualified voter in his home election district to cast for him on the day of election the ballots contained in the envelope. The statement and authority had to be signed by the voter and attested by the commander or other commissioned officer of the company of which he was a member. In addition to this an affidavit was required properly sworn to before some official or other person duly authorised to administer oaths to the effect that the voter was a qualified voter in the district in which he proposed to vote.

A form that was used ran as follows:

I —— —— do hereby state that I am a qualified elector of the Commonwealth of Pennsylvania, now in actual military service under the requisition of the President of the United States, and as such absent from my place of residence, which is —— in —— county in the said Commonwealth of Pennsylvania; being —— in the —— regiment of ——; and being now in —— and for sufficient and legal reasons separated from my proper company, on —— duty under such circumstances as render it probable that I will be unable to join my said company or to be present at my proper place of election on the —— day of —— next; there being less than ten in number of such electors in the said —— at ——; and I, the said —— ——, do hereby authorise and empower —— ——, being a qualified elector in the election district aforesaid, of which I am a resident, to cast the ballots contained in the envelope hereof for me, on the day of election aforesaid.

Signed by me in witness thereof, at —— on the —— day of —— in the year 1864.

Attested by me, ——
—— of ——

Affidavit.

I, the aforesaid —— ——, do swear that I am a qualified voter in the election district aforesaid in which I propose to vote; that I am in the actual military service of the United States in —— of the —— regiment of —— soldiers; that I have not sent my ballots to any other person or persons than the said —— —— in the aforesaid authority mentioned; that I will not offer to vote at any poll which may be opened on the aforesaid election day at any place whatsoever; that I am not a deserter; that I have not been dishonorably dismissed from the service and that I am now stationed at —— in the State of ——.

Sworn and subscribed by the said —— —— etc.
In witness whereof, I have hereunto set my hand, etc., etc.

The method of opening and casting the vote was provided for as follows:

The elector to whom such ballot shall be sent shall, on the day of election, and whilst the polls of the proper district are open, deliver the envelope so received, unopened, to the proper election officer, who shall open the same in the presence of the election board and deposit the ballots therein contained together with the envelope and accompanying papers, as other ballots are deposited, and said board shall count and canvass the same, in the same manner as other votes cast at said election; and the person delivering the same may, on the demand of any elector, be compelled to testify on oath, that the envelope so delivered by him, is in the same state as when received by him, and that the same has not been opened, or the contents thereof changed or altered, in any way, by him or any other person.

Penalties for making a false affidavit or making a false oath were set at one thousand dollars and imprisonment up to five years.

In case any qualified elector on military service was in a hospital, or in a Government vessel, or a navy yard, the statements and affidavits might be witnessed and made before any officer of the vessel, navy yard, or hospital in which the said voter was for the time being engaged.

The Kansas-Nebraska Method.—In the states of Missouri, Kansas, and Nebraska, any qualified voter who finds himself necessarily absent from his home on "election-day" may present himself for voting at any polling-place in the state outside of his own county. He carries with him no certificate or permit from the election or other officials at his home. He need not be identified by any person where he proposes to vote. He starts the process of absent voting by appearing before a judge of election at a polling-place while the polling is on. He there makes a sworn declaration that he is "A. B." a qualified elector of ——, in that state, that he is unavoidably absent from his home, where he is qualified, and cannot return there to vote in person, and also that he has not voted elsewhere. He then marks a ballot and presents it to the election officials. Those in charge of the polling-place do not deposit this ballot with the other ballots presented by residents of that place, nor do they enter the vote in the poll-book. They seal the ballot at once in an envelope, upon the face of which they write the name and address of the voter. This envelope then passes unopened from the judge of elections to the county clerk of the county where the vote is cast, and is immediately forwarded by that official by post to the county clerk of the county where the voter resides. The envelope is there opened by the county election commissioners at their official canvass and if the ballot be in order it is counted, and the vote is added to the poll-sheet of the voter's home polling-place. Heavy penalties are provided as a check against fraud and to secure secrecy.

Nine States[1] now make some provision for so-called absent voting, but no law in the United States recently enacted deals with voting *in absentia* when the elector is outside the limits of his home state, since the Federal Government does not exercise jurisdiction or control over elections.

Voting by Post in North Dakota.—The North Dakota law embodies the principle of actual voting by post.[2] The election officials are not charged with any duties of transmitting ballots to the returning officers. The would-be absent voter takes a prescribed oath and himself deposits his ballot, properly enclosed, in any post box. This simple plan has the following features:

1. A specially prepared "absent-voter ballot," printed on tinted paper, which the applicant can obtain on request from the auditor of his home county by filling out an application form.

2. An envelope to hold the above, having a form of oath on the outside to the effect that the applicant "A. B." is a qualified voter at X. in the State of North Dakota, and will have no opportunity to vote there on the day of election. This declaration is made before

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[1] Kansas (1901), Missouri, Nebraska, North Dakota, and Minnesota (1913), Colorado, Michigan, Montana, and Washington (1915).

[2] See Laws, 1913, chap. 155.

any official authorised by law to administer oaths, in whose presence the voter secretly marks and folds his ballot, and seals the same inside the envelope which shows the affidavit on its face.

3. A second envelope to hold the above, addressed to the proper election official of the polling-place where the voter would cast his ballot if he were at home, which the voter himself places in the post.

4. The envelope is opened on polling-day at the polls while they are open and, if the affidavit is found to be in order and the voter is found to be properly enrolled at that polling-place, the ballot is duly deposited in its proper box.

The North Dakota plan requires early voting on the part of all who wish to participate. In order to be counted, all absent-voter ballots must arrive at the polls before they are opened or while they are still open. It also allows a person who expects to be absent on polling-day to prepare his ballot in advance, and deposit it with the proper election official before he leaves his home.

Australia's Postal Vote.—The Commonwealth Electoral Act passed in 1902[1] embodied procedure which had been in force for several years in some of the states. Under this Act—

> any Australian elector who has reason to believe that he will be more than five miles away from the polling-place for which he is enrolled; or who being a woman believes that she will on account of ill-health be unable on polling-day to attend the polling-place to vote; or who will be prevented by serious illness or infirmity from attending the polling-place on polling-day may after the issue of the writ and before polling-day make an application in the form K in the Schedule (to the Act) to the returning officer for the division in which he lives for a postal vote certificate.

This "postal vote certificate" distinguishes the Australian law from the American laws above noted. In the States of Missouri, Kansas, Nebraska, and North Dakota, the absent voter is not required to carry any credentials from home officials. This is deemed unnecessary since the ballot is only counted at home, and if the voter whose ballot arrives from another polling-place is not properly registered, his ballot is not counted. There is thought to be little danger of fraud.

The State of Minnesota, however, not only follows Australia in requiring a voting certificate from the judge of election in the district in which he is a legal voter, but goes one step farther. An absentee voter holding a voting certificate is required, if he presents himself for voting at any polling-booth in the state, to be identified by two qualified resident voters as the rightful holder of the certificate. If his vote is allowed, the ballot is forwarded to his home county in a sealed envelope after the Kansas plan.

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[1] See Commonwealth Statutes, 1902, No. 19, ss. 109–22.

The Australian absent voter receives along with the postal vote certificate a " postal ballot-paper " with a counterfoil attached, and also an envelope addressed to the returning officer at the chief polling-place of the division. The only persons before whom he may prepare his ballot are a postmaster, a stipendiary or special magistrate, a head-master of a state school, or a person in the public service who may be appointed for the purpose by the Governor-General.

The voting process[1] is described under five heads :

I. By exhibiting the ballot-paper unmarked and in the condition in which it was issued ;

II. By marking his vote on the ballot-paper, but so that the postmaster, magistrate, head-master, or other person appointed shall not see the vote ;

III. By signing his name on the counterfoil ;

IV. By presenting the ballot-paper, folded up, to be witnessed ;

V. By enclosing the ballot-paper with the counterfoil attached as witnessed, together with the postal-vote certificate in the envelope, addressed to the returning officer, and having closed the envelope, by handing it at once to such postmaster, magistrate, or head-master or other person for posting.

At the scrutiny, the officer conducting the scrutiny produces the unopened envelopes containing the postal votes received up to the close of the poll, and they are then opened in the presence of the scrutineers present.

Without unfolding the ballot-paper or allowing it to be inspected, the officer compares the signature of the voter on the counterfoil with the signature to the application, and allows the scrutineers to inspect both signatures. If the signature on the ballot-paper is found to be the signature of the applicant, the vote is allowed. The officer tears off the counterfoil and inserts the ballot in the ballot box. If the vote is not allowed, the certificate and ballot-paper are preserved for production at any Court of Disputed Returns which may be held, being sealed up at once without being unfolded or inspected. Postal ballot-papers which are not duly witnessed are thrown out, but the omission of a Christian name does not invalidate a ballot if no other candidate has the same surname as the candidate voted for.

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[1] The various forms in use are attached to the Commonwealth Statutes, 1902–5, at p. 127.

The Australian law also provides for assistance in the preparation and folding of a ballot in the case of a voter whose sight is impaired or who is otherwise physically incapacitated.

New Zealand's Voting Permit.—The New Zealand absent-voting Act was passed in 1905.[1] It requires an application in advance, and if a voting permit is granted, the holder thereof may apply at any polling-place outside the district for which he is enrolled, and there fill up a ballot-paper and deliver the same to the officer in charge. The ballot is enclosed in an envelope by the returning officer, and posted to the returning officer of the voter's home district.

In the earlier law of New Zealand it was provided that at the close of the poll the returning officer should transmit by telegraph "or other expeditious means" to the returning officer of the district for which the vote was exercised a statement of the name, address, and occupation or description of the elector who had exercised his vote, and the number of his voting permit. The law as amended in 1910[2] imposed this duty "immediately a vote is recorded."

The penalty imposed in New Zealand for violation of the law is £50, or imprisonment for six months.

New Zealand's Emergency Law for Expeditionary Forces.—Just a month after the outbreak of war, New Zealand passed the Expeditionary Forces Voting Act, by which members of the Expeditionary Forces sent from New Zealand to serve in the war were given a right to vote at the next general election, and at the licensing poll to be taken at the same time.[3]

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[1] See *Consolidated Statutes*, 1908, vol. iii. p. 546.

[2] No. 59, s. 41 (5), p. 279.

[3] See New Zealand Statutes, 1914, No. 16, passed September 4, 1914.

The machinery adopted is the simplest imaginable. The voter is given a voting-paper bearing on its face:

ELECTORAL DISTRICT OF ——
GOVERNMENT
OPPOSITION
LABOUR

Direction to voter:

The voter must leave untouched the name of the party for which he desires to vote and must strike out the names of all other parties.

The section of the Act which explains this unique ballot reads:

Every vote given as aforesaid for any party shall be counted as a vote for the candidate who has been selected in the manner hereinafter described as the candidate representing that party in the electoral district in which the voter resided immediately before joining the Expeditionary Force.

A voting-paper is to be supplied by an electoral officer appointed for the purpose to every member of the Forces who applies for one. When the voting-paper has been marked for voting by the soldier, he encloses it in an envelope addressed to the returning officer of the electoral district in which he resided when he enlisted, and having sealed the envelope, delivers the same to the electoral officer, whose duty it is to forward it to the Chief Electoral Officer at Wellington.

The New Zealand plan involves the appointing of electoral officers for the several groups of the Forces wherever they may be. The duties of these officers must be performed sufficiently soon after the writ is issued to enable the marked ballot-papers to reach the Chief Electoral Officer before the date fixed for the general election.

When the Chief Electoral Officer receives the envelopes, addressed as aforesaid, from the several electoral officers, it is his duty to forward them at least seven days before the general election to the returning officer of each electoral district, or, in the case of licensing voting-papers, to the returning officer of each licensing district.

At the counting of the votes, the returning officer opens the envelopes and deals with them as if they had been issued pursuant to an "absent-voter's permit," which has already been described, as provided for by the Act of 1905.

This Act of 1914 is strictly an emergency measure, ceasing to be operative at the completion of the next general election.

Canada's War Legislation.—An Act to enable Canadian soldiers on active military service during the present war to exercise their electoral franchise became a law April 15, 1915.[1] It is strictly a war measure, and is to remain in force only during the present war.

The soldiers entitled to vote are: male British subjects of at least twenty-one years of age who within six months immediately preceding the date when appointed to or enlisted in the military forces of Canada had been resident in any electoral district in Canada for a period of not less than thirty days, and were then qualified to vote there.

The Act provides that a sufficient supply of ballot-papers in a form prescribed and of envelopes for holding the same with a form of affidavit printed thereon shall be sent by the Clerk of the Crown to the officer in command of the Canadian troops at Bermuda, and to the Secretary of the High Commissioner for Canada in London, England. When the writ for a general election is issued, these officials are to be notified of the fact by cable, and they are required thereupon to distribute the ballot-papers and envelopes among the officers commanding the squadrons, companies, batteries, etc., so that each volunteer soldier shall be provided with a ballot-paper and envelope.

The form of ballot provided shows four blank ballot-papers, each printed in English and in French:

1. I vote for ....
   Je vote pour ....

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2. I vote for the Government.
   Je vote pour le Gouvernement.

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3. I vote for the Opposition.
   Je vote pour l'Opposition.

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4. I vote for the Independent Candidate.
   Je vote pour le Candidat Indépendant.

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[1] See Statutes of Canada, 1915, chap. 11.

The form of affidavit reads:

I (here insert full name), a (here insert rank and name of corps), make oath and say as follows:—

1. That within the six months immediately preceding the date when I was (enlisted or appointed as the case may be) in the military forces of Canada, the last place in which I was resident for thirty days is (here insert place of residence before enlistment, giving where possible the street address, range, township, or such other precise indication thereof as may be practicable) in —— in the province of —— and that I am not qualified to vote in any other electoral district.

or—

1. That immediately before I was enlisted (or appointed as the case may be) in the military forces of Canada, I was qualified to be a voter at —— in the province of ——.

2. That I have not marked any ballot paper for this election in any election district.

3. That I am a British subject of the full age of twenty-one.

Sworn before me this ——
day of —— A.D. 19—.
(signature, rank and corps
of commissioned officer).

————————
voter's signature.

Every soldier who makes the affidavit is to be given a ballot-paper, which he may then mark in the presence of a commissioned officer, but in such a manner as not to disclose to the officer or any other person how he is voting. He then folds the ballot-paper, and places it in the envelope, upon the back of which is a certificate to be signed by the commissioned officer, to the effect that the document contained in the envelope was written in his presence by the person named, and that according to the best information at his disposal, he believed the statements contained in the affidavit to be true.

The Act provides how the envelopes are to be placed in suitable receptacles, securely fastened and sealed and forwarded by post to Canada; how the returning officer shall give notice to all candidates that he will open packages containing soldiers' votes at a certain time and place, so that they or their agents may be present while the envelopes are being opened; and how the ballots are to be counted and doubtful cases settled.

If any envelope is not received before the close of the poll on polling-day, it is not to be opened, but is to be kept with the other papers relating to the election, and when these are destroyed, it is to be destroyed unopened.

The Act also provides for holding a poll at each military camp or base at which volunteers are being trained in Canada for service during the war.[1]

Upon the issue of the writs for a general election, a proclamation is to be made notifying volunteers that they must make to the returning officer at each camp or base a written claim to the right to vote in a particular electoral district where each was qualified to vote at the time of his enrolment or enlistment, or where he resided for thirty days within the six months immediately preceding his enlistment. An affidavit must accompany each claim.

From the written affidavits filed with him, the returning officer at each base or camp must prepare a list of soldier-voters. He notifies the returning officer of each district that soldiers have claimed the right to vote for his district. The returning officer of each district then forwards to the camp or base returning officer a certified copy of the voters' lists for his district and telegraphs to him the names of the candidates nominated.

A poll is opened at the camp or base on the day fixed for holding the general election, and the usual officials are provided for the polling such as the Dominion Election Act requires.

A volunteer whose name is not on the list which has been prepared for the election may take oath and claim his vote as a qualified voter for any election district.

The military authorities at every camp or base are required to afford all facilities necessary for the holding of the poll.

At the close of the poll, the votes are counted and the returning officer telegraphs the result to the returning officers of the several electoral districts for which votes have been cast, and sends by registered mail immediately thereafter to such returning officers the ballot-boxes as received by him from the deputy returning officers, having first sealed them as provided by the Election Law.

In case volunteers should be under orders to leave Canada subsequent to the issue of the writ, but prior to polling-day, the Governor in Council is empowered to hold a poll on a day previous to their departure.

Offences against the Act are enumerated, and penalties prescribed.

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[1] Chap. 11, s. 5, p. 5.

CHILDREN AND THE CINEMATOGRAPH.

[*Contributed by* EDWARD MANSON, ESQ.]

Maxima debetur pueris reverentia.
" Children must not hear improper stories."
PLATO, Rep. 2, 377.

READERS of Thackeray will remember the scene in *The Newcomes* at the " Back Kitchen " when tipsy old Captain Costigan starts singing a ribald song, and the Colonel seizes Clive's hand and stalks away in indignant protest; and probably most of us have envied the moral courage of the fine old Colonel on the occasion. That was the pre-education era when Fagin was holding school in the purlieus of Snow Hill and London was swarming with street arabs and homeless little vagrants, quite unregarded by the respectable part of the community. We are much more solicitous nowadays for the welfare of the children and their protection against evil influences. We have established Children's Courts in most parts of the United Kingdom to save children who have been doing wrong from the contamination of contact with the hardened criminal; we do all we can to keep them out of prison. Yet with strange inconsistency we suffer them to see and hear things which belong to the darkest side of human nature, to read all kinds of unwholesome and demoralising literature, to roam the streets at all hours, and to live, often, in vicious surroundings in homes which are no homes.

Juvenile Crime and the Cinematograph.—From a circular letter recently issued by the Home Office to the clerks to justices, it appears that there has been a startling increase of juvenile crime since the war began. Inquiries have been made by the Home Office of the police of seventeen of the largest towns in the kingdom, and the reports show that while the total number of children and young persons charged with punishable offences from December 1914 to February 1915 was only 2,686, it had grown in December 1915 to February 1916 to 3,596, and this increase had been experienced in all the towns consulted—pointing to some common cause in operation.

This increase in the number of juvenile offenders is mainly an increase in the matter of larceny—which accounts for 50 per cent., but it includes also more charges of assault, malicious damage, gaming, and offences against the Education Acts. For this outbreak of lawlessness the relaxation of parental discipline is, no doubt, largely responsible. Fathers are away at the war, or engaged in munition making, and mothers are not equal to the task of managing unruly boys; but there seems every reason to think that the cinematograph film is not without its share in stimulating the youthful imagination to emulate the feats of lawlessness and crime which they see so vividly depicted there.

> Many chief constables of large towns (the Home Office circular goes on) and other persons interested in the welfare of the young have represented that children are led to commit offences by witnessing cinematograph films depicting crimes, the use of firearms, etc., and that children often steal money in order to obtain admission to cinemas. The whole question of the censorship of films is under consideration by the Secretary of State; but he thinks that where the justices are the licensing authority under the Cinematograph Act, 1909, special attention should be given to the nature of the films which it is proposed to show at children's performances.

Few people have any idea of the scenes presented to the eyes of children in the cheap shows that now abound in every large town or travel about from one village to another—scenes depicting burglaries, robberies, suicides, gambling hells, glove fights, railway accidents, motor smashes, and other horrors—still less have they any idea of the number of children who crowd to see them. A census recently taken in Liverpool showed that on one day in that city there were 13,000 children between the ages of four and thirteen attending the shows. In London the children may be seen waiting in a long queue for the early evening performances, and on Saturday afternoon the children seem to constitute the chief part of the spectators.

Police Court Episodes.—At Mortlake Police Court the other day, a Barnes schoolboy, aged thirteen, admitted getting into a shop and stealing a cash-box containing 18*s*. Asked for an explanation, he said: "I saw it on the pictures at Hammersmith. I saw men get a ladder, put it up to a window, break into the house, take money, and hide it in the ground. Something said in my mind when I saw the ladder, 'Go and have a try, and see if you can do the same.' I hid the money in the ground on Barnes Common, but when I went again the money had gone. If I had told my father he would have given me the biggest thrashing I ever had." In ordering the boy to be sent to an industrial school for three years, the chairman said it was a great pity that the cinema, which could be made an influence for good, should have such a bad effect on boys.

Another schoolboy of thirteen was remanded at the Children's Court at West Ham on Saturday on the charge of stealing a macintosh. He had been employed by a Mr. Jones at Holbrook Road, West Ham, and on the 12th inst. he went to the house and asked for "the guv'nor's" overcoat. Mrs. Jones said her husband had that with him, and she thought he must mean the macintosh. The lad said "Yes," and the macintosh was given to him. The boy told the magistrate he saw it done on the pictures. Another lad, aged twelve, charged with stealing from his stepfather, said he had been tempted to steal because "he wanted to go to the pictures."

Sir Francis Fox said that some time ago he had a boy before him for setting fire to a church, who pleaded that he had seen it on the cinematograph.

The above samples are but a few out of the many which might be given, but they serve to illustrate the influence of the film and the psychology of the boy mind. We need not postulate any great degree of depravity in these juvenile delinquents. Chief Justice Fortescue was positively proud of the number of Englishmen who in his time were hanged in a year. It argued the national spirit. The French "lacked hartes" to commit crimes. So of the British boy. His delinquencies spring from a superabundance of animal life and love of adventure. If what physiologists tell is true,[1] he is living through the past—those periods in the history of the human race when

> The good old rule sufficed them—the simple plan
> That they should take who have the power
> And they should keep who can.

He would fain emulate the deeds of Dick Turpin, Jack Sheppard, or Captain Kidd, though to his credit it may be said that if there is a choice, he prefers to be a hero to a villain.

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[1] "The history of the human fœtus," says Haeckel, "is a recapitulation of the history of the human race."

The Cinematograph and Suggestion.—Given this temperament, the cinematograph film furnishes him with abundant suggestions. Imitation is natural to all children and young persons. What they see they try to reproduce. Only the other day two children who had been to see *Peter Pan*, and watched the children there flying backwards and forwards through the window with all the lightness of swallows, went home, tried to fly through the window themselves, and were killed. In the boy bravos of the film we simply have illustrated the truth of the old adage—

> How oft the sight of the means to do ill deeds
> Makes ill deeds done.

This suggestiveness of the cinematograph scenes is a real power for good or evil which as yet we but half understand, and it comes with an added force, in the case of films, from their appeal to the eye, so much more powerful than to the ear.

> Segnius irritant animos demissa per aures
> Quam quae sunt oculis subjecta fidelibus, et quae
> Ipse sibi tradit spectator.

Hence the picture dreadful is more pernicious than the "penny dreadful" of literature. There is another reason—the exaggeration of expression in the film acting as compared with the actors on the stage. Such exaggeration is necessary, no doubt, to explain or emphasise the dumb show, but it makes the impression stronger—on the child mind at least—by intensifying every passion.

The Censoring of Films.—With such possibilities of influence, it became apparent from the first that cinematograph films must be subject to a censorship of some kind, and there are hardly any civilised countries in the world which have not provided for their control. Sometimes the Legislature has required that the films should be examined before exhibition (Quebec, Gambia, Gold Coast, Fiji, Nigeria) or stamped by a Board of Censors (New Brunswick); sometimes that a description of every scene should be submitted to the licensing officer (Falkland Islands, St. Helena, the Straits Settlements, East Africa). Manitoba has given the widest powers of control. Ordinance No. 4, 1912, of this Province enables the city of Winnipeg to appoint a censor or censors of cinematograph films "with a view to prevent the depicting of scenes of an immoral or obscene nature, the representation of crime or pictures reproducing any brutalising spectacle or which indicate or suggest lewdness or indecency or the infidelity or unfaithfulness of husband or wife, or any other such pictures as he or they may consider injurious to the morals of the city or any citizen thereof, *or which may offer evil suggestions to the minds of children* or against the public welfare or which may be likely to offend the public."

Here for the first time we have in express terms a recognition of the claims of the child mind to consideration.

The Trade Censorship and Children.—The censorship of films has in England been much facilitated by the British Board of Film Censors, established by the joint efforts of the cinematograph manufacturers and exhibitors, with Mr. G. A. Redford as director and four examiners. There is a miniature theatre at the office of the Board, and the pictures for approval are shown on a screen. Those excepted to are not altogether banned, but referred back, and alterations invited to remedy what is objectionable. This is good so far as it goes, but no *general* censorship can ever be adequate—this is what the writer would suggest—because it does not take note of the essential differences between the child mind and that of the grown-up person. Much which has a meaning for a grown-up person—a compromising situation or a *double entendre*, for instance—passes innocuous by the child. Much which the grown-up person laughs at and forgets sinks deep into the child mind. Childhood lives in a dream world. Charles Lamb tells us how, as a child, he was haunted for years by a picture he saw in Stackhouse's *History of the Bible* representing Samuel raising the Witch of Endor :

> Oh, that old man covered with a mantle—a hag that nightly sate upon my pillow. . . . I durst not even in the daylight once enter the chamber where I slept without my face turned to the window, averse from the bed where my witch-ridden pillow was.

It is the same with many children. The present writer well remembers how he was haunted as a child by a similar picture in the old Pantheon called "The Raising of Lazarus."

One way of supplementing the defects of the general censorship in the case of children is to exclude all children under, say, fourteen from the exhibitions, unless accompanied by a parent or guardian : and this is what a good many local authorities have done, and are doing; but their efforts have been neutralised by a case in the High Court, *Theatre de Luxe, Halifax, Ltd.* v. *Gledhill,*[1] deciding that a condition attached to a cinematograph licence, that children are not to be admitted to performances after a certain hour unless so accompanied, is unreasonable and *ultra vires.* The reasons given for this decision, from which Mr. Justice Atkin dissented, are highly technical and not very convincing, and seem at variance with the principles laid down by Lord Alverstone and Lord Justice Pickford as to the power of licensing authorities to impose conditions in the general interests of the public. But there the decision is, and it has to be reckoned with by licensing authorities.

The New Liverpool Regulations.—Liverpool affords perhaps the most interesting experiment in children's cinematograph legislation. In a recent report to the education authority of that city, nearly all the teachers in the elementary schools concurred in the opinion that the shows held in dark and often ill-ventilated rooms were detrimental to the children, both physically and morally, and stimulated by this report stringent regulations have been passed, which came into operation at the beginning of last May. Children under fourteen will not be allowed to be in cinematograph exhibitions after 6.30 p.m. unless accompanied by their parents or guardians.

At afternoon performances when the lower price is 2*d.* or less, only such films may be shown as are judged suitable for children. The licensee has to send to the police every Monday morning a printed programme or list of the films to be used during the week, and no film may be used if the justices give notice of objection. If complaint of any film should reach the justices from any source, the licensee is to submit it for their inspection and judgment, and if there be three or more well-founded complaints, it will be in the power of the justices to suspend or revoke the licence.

A similar regulation is in force in Switzerland in the Canton of Zurich. Children are allowed to attend only performances specially arranged for them, with specially licensed films; and in Germany generally a strict censorship is exercised over all films to be shown at performances to which children may be admitted. Children under sixteen or fourteen in most of the large towns are forbidden to go to any performance except such as have programmes which have been specially authorised as suitable for children.

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[1] [1915] 2 K.B.D. 49.

This lead by Liverpool is in the right direction and will, it is to be hoped, be generally followed.

Educational Aspect of the Cinematograph.—That the cinematograph is destined to revolutionise educational methods there can be little doubt. Whether it is history or geography, science or art which is the subject-matter, the moving pictures of the cinematograph films are an incomparable medium for conveying instruction and fixing impressions—supplemented, of course, by lectures or oral comment. In history, what an endless pageant may be passed before the child mind, illustrating every aspect of their own and other nations' development. "'Tis sixty years since," but the writer remembers as vividly as if it were yesterday two episodes of English history in that old Pantheon gallery—before alluded to—"The Sinking of the White Ship" and "The Killing of the Tax-gatherer by Wat Tyler." What an unforgettable object-lesson was that life-like representation of the Indian Durbar at the Scala Theatre not long since. And geography! It has been truly said that you never learn geography but by travelling—certainly you do not by committing to memory long lists of cities, rivers, and mountains. Children cannot travel, but a trip on the cinematograph film—and you may do it for 6*d*. to any part of the globe—is the best of all substitutes for actual travel.

For the purpose of science the cinematograph is an even more powerful agency. For it can analyse processes too rapid for the eye to follow, such as the movements of a galloping horse, the flight of a bullet as it cleaves the air, or the melting of a snowflake; and it can condense into a few minutes processes of nature which are too slow to be watched—such as the germination of a seed, the birth of a butterfly from the caterpillar, the evolution of a chick from the egg. What a revelation of life under the sea has recently been given us by the two brothers Williamson at Great Portland Street.

In recognition of these claims of the cinematograph and in response to the conferences of educationists in all parts of the country, the Educational Cinematograph Association has been formed with the object of introducing the cinematograph into the curriculum of our primary and secondary schools and technical institutes, and lately the Architectural Association gave the subject a very practical turn by exhibiting a series of films dealing with technical matters of building construction. The idea might easily be extended to other trades—bookbinding, engine building, carpentery, pottery, and many more matters, and would form a valuable training for those taking up a trade on leaving school.

Germany has already pressed the cinematograph into the service of its Kultur, and not only gives lectures on simple scientific subjects for a small sum to parties of children in charge of a teacher, but has collected—at Berlin—a large library of educational films which are let out at cheap rates to schools and institutes.

NOTES ON CASES.

AUSTRALIA.

[*Contributed by* JAMES EDWARD HOGG, ESQ.]

Sunday Observance Act.—Cases under the 29 Car. II. c. 7 (the statutory short title of which is the Sunday Observance Act, 1677), have been fairly frequent in Australia. In *Nicholls* v. *Stanton*,[1] an action was brought, not directly on a contract made on Sunday, but for a fraudulent misrepresentation inducing the contract—which was one for the sale of a motor car. It was held that, though the plaintiff was suing in tort and not in contract, this made no difference, and that as he had to give in evidence a contract which was illegal he could not recover in his action for the tortious act of the defendant.

Money-lenders Act.—An extremely hard case under the New South Wales statute answering to the Money-lenders Act, 1900, appears in a recent report: *Bull* v. *Simpson*.[2] The definition of " money-lender "—every person " whose business is that of money-lending "—was held wide enough to include the case of a person who lent large sums of money on ordinary mortgage securities at ordinary rates. In consequence of a mortgagee being held to be a " money-lender "—and of course being unregistered—foreclosure was refused him. No English case seems to have gone so far as this.

Option of Purchase and Perpetuity.—A New South Wales case on the construction of an option of purchase in a lease is worth noting: *Shearer* v. *Wilding*.[3] The option was to purchase " at any time after the expiration of two years " of the term, and was only saved from the destructive effect of the rule against perpetuities by being construed as exercisable during the term of the lease only.

Appeal from a Verdict of Not Guilty.—The report in the case of

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[1] (1915) 15 S.R. (N.S.W.) 337.

[2] *Ibid.* 365.

[3] *Ibid.* 283.

The King v. *Snow*[1] before the High Court of Australia occupies sixty-five pages of print. The Court of six judges was evenly divided as to its power of entertaining a criminal appeal from a State Court, but decided by a majority of four to two to refuse special leave to appeal. A verdict of not guilty had been returned by direction of the judge who presided at the trial of the accused, and judgment accordingly was entered. The Crown applied for special leave to appeal. It was contended that the statutory powers of the High Court of Australia were greater than those ordinarily exercised by the English Courts, and that under the circumstances it was not the verdict but the direction of the trial judge which it was sought to set aside. However, as the case stands, it affords no precedent for breaking the rule that there is no appeal from a verdict of not guilty.

Detention in Military Custody.—In *Lloyd* v. *Wallach*[2] the High Court of Australia held a statutory regulation to be valid, under which naturalised persons suspected of being " disaffected or disloyal " may be " detained in military custody " during the war. This is on the lines of English decisions; but the Supreme Court of Victoria was reversed.

Crown in State and Commonwealth.—The constantly recurring difficulty about the meaning of " Crown " cropped up in *The King* v. *Registrar of Titles*[3] before the High Court of Australia. A statute of the State of Victoria authorised the lease of land to His Majesty. A lease was granted to the Commonwealth. This was held (by a majority of four to two judges) an invalid exercise of the leasing power, on the ground that " His Majesty " in the Victorian statute meant the Crown in its " Victorian capacity," not as representing the Commonwealth.

Railway Passengers and Contributory Negligence.—A case of some general interest on the subject of railway travelling is *Cashmore* v. *Chief Commissioner for Railways.*[4] Here the High Court of Australia, reversing the Supreme Court of New South Wales, held that it is not necessarily contributory negligence for a railway passenger on a moving train to protrude his arm from the window of the carriage. A passenger doing this was struck by another passing train, and was held entitled to hold his verdict for damages.

Value of Land for Tax Purposes.—Taxation which involves the consideration of two values of the same land—as it is (with buildings, etc., on it) and as it would be if divested of buildings, etc.—has given rise to the same kind of difficulties in Australia as have been experienced in England, when the Courts are asked to construe the taxing statutes and definitions contained in them. A typical case is *Campbell* v. *Deputy Federal Commissioner of Land Tax.*[1] Here we seem to have a faint echo of the " full site value " controversy—the Australian equivalent being " unimproved value." The case is worthy of the attention of English lawyers, if only for the judicial suggestion that it would be better " if the Legislature were to amend the definition of ' unimproved value ' by putting it on a practical instead of a hypothetical basis."

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[1] (1915) 20 C.L.R. 315.

[2] *Ibid.* 299.

[3] *Ibid.* 379.

[4] *Ibid.* 1.

Inter-State Commission not a Court.—Constitution lawyers will find the case of *State of New South Wales* v. *Commonwealth*[2] of great interest. The High Court of Australia has decided that under the Constitution Parliament cannot set up the Inter-State Commission as a " court of record " with other judicial powers, such as power to grant injunctions, etc. The section of the statute creating the Commission a " court of record " is modelled on an enactment in the Railway and Canal Traffic Act, 1888, which makes the Railway and Canal Commission a " court of record." The Parliament of the United Kingdom is of course free from most of the fetters of a written Constitution. The above case is also of some general interest as dealing with one phase of war legislation—the expropriation of personal property and annulling of contracts, the property in this instance being wheat.

Colonial Laws Validity Act.—The case of *Attorney-General for Queensland* v. *Attorney-General for Commonwealth*[3] is chiefly of interest as being a case in which the aid of the Colonial Laws Validity Act, 1865, was invoked against legislation of the Commonwealth of Australia. It was held by the High Court of Australia that the imposition of a land tax by the Commonwealth on the holders of Crown land under lease from a State is not " repugnant " to the statutes giving the States (then Colonies) the right of managing Crown lands. The case is likely to be carried to the Privy Council.

Law and Equity in New South Wales.—In a previous issue[4] attention was drawn to the fact that justice occasionally failed to be done in New South Wales through the absence of modern procedure,

[1] (1915) 20 C.L.R. 49. [2] *Ibid.* 54. [3] *Ibid.* 148. [4] Vol. xv. p. 243.

law and equity being still administered on separate sides of the Supreme Court. Another instance of the same kind is furnished by a case decided at the end of 1915—*Davis* v. *Maconochie.*[1] A lessor suing his lessee on the Common Law side of the Court, upon a covenant to pay rent contained in a lease under seal, was met by the plea that the lease was not registered, and being unregistered there had been no actual demise at law. This plea the Court upheld. It is only fair to add that it was pointed out in the judgment delivered that the plaintiff would have been entitled to recover under the procedure which now obtains in England. All the other Australian States have adopted the system introduced by the Judicature Act, 1873.

Australian Cases in English Courts.—Australian cases are beginning to be found helpful in the English Courts. In *In Re Robson* [2] a question arose as to the effect of the devolution of realty on the executor under the Land Transfer Act, 1897, in preserving contingent remainders from destruction. Two Australian cases were cited by Mr. Justice Astbury as in point.

QUEBEC.

[*Contributed by* PROFESSOR R. W. LEE.]

PROBABLY Quebec is the only portion of the British Empire where a judge may hold himself at liberty to refuse to be bound by a decision of a Court of superior jurisdiction because he does not agree with it. A recent instance is afforded by *Durand* v. *Bernier*,[3] in which the Court was called upon to decide between the conflicting claims of the seller of a gasoline motor, who had stipulated that it should remain his property until the price had been fully paid, and that he might resume possession in the event of default in payment, and a creditor of the purchaser, who had taken a hypothec upon the immovable property, to which the engine was at the date of the hypothecation annexed. Had the engine become immovable by destination so as to be bound by the hypothec? Sir F. Lemieux, Chief Justice of the Superior Court, decided affirmatively, refusing to follow the decision of the Supreme Court of Canada in *La Banque d'Hochelaga* v. *The Waterous Engine Works Co.*[1] This decision was in the opinion of the learned Chief Justice irreconcilable with previous decisions of the same Court, and he disposed of the matter as follows:

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[1] 15 S.R. 510.

[2] (1916) 1 Ch. 116.

[3] Rapports judiciaires de Québec, 49 Cour Supérieure 217.

> Cette décision isolée d'un tribunal qui, dans l'espace de très peu de temps, se déjuge d'une façon aussi singulière, ne forme pas et ne peut aider à former la jurisprudence, surtout lorsque cette décision est en contradiction flagrante avec les décisions du même tribunal et casse l'arrêt d'un juge aussi éclairé que l'était M. de juge de Lorimier. Il convient d'ajouter qu'un des membres de la Cour Suprême, M. le juge Girouard, n'a pas concouru dans ce jugement et que son dissentiment est d'une force de logique et de raisonnement capable de convaincre tous ceux qui feront l'étude consciencieuse de la loi en pareille matière.
>
> Comme dit Laurent, les arrêts n'ont aucune valeur à moins qu'ils ne soient fondés en droit et en raison.

Is a woman disqualified for practising law? The question was decided affirmatively in *Dame Langstaff* v. *The Bar of the Province of Quebec.*[2] The arguments were of the usual character.

In *Clendenning* v. *Cox*[3] the Superior Court in review was called upon to interpret the following writing:

> I the undersigned give H. M. Clendenning or any other person assigned by him the option on [a specified plot of land] for the amount of $500 payable on the passation of the deed of sale. (Signed) JOHN COX. . . . This option to expire May 30, 1912.

The plaintiff said that he had accepted the option within the time limited and tendering payment sued *en passation de titre.* The defendant pleaded that before acceptance of the offer by the plaintiff he had cancelled it, and notified the plaintiff to that effect. The Court of Review (Archibald A.C.J., Greenshields J.—Mercier J. dissenting) held that there was no contract of sale; that if any contract existed between the parties it was merely a contract to give plaintiff time to accept and was manifestly not a contract of which the Court could order specific performance; that it was not shown that the plaintiff agreed either to give or to do or not to do anything as a consideration for the said offer, and that therefore there was no consideration coming from the plaintiff to the defendant, and therefore no valid contract between the parties. The discussion turned upon the interpretation of Art. 1476 C.C. which says:

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[1] 27 S.C.R. 406.

[2] Rapports judiciaires de Québec, 25 Cour du Banc du Roi (en appel) 11.

[3] *Ibid.* 49 C.S. 71.

> The simple promise of sale is not equivalent to sale, but the creditor may demand that the debtor pass to him a deed of sale in accordance with the conditions of the promise, and that in default by him to do so the judgment may be equivalent to such deed and have all its legal effects.

The majority of the Court held that the promise of sale referred to is a bilateral promise of sale (*scil.* part of a contract to sell), in which the vendor has promised to sell and the purchaser has promised to buy. On the other hand Mercier J. relying on French commentaries declared that what is intended by Art. 1476 is a unilateral contract of sale, *i.e.* one which binds a seller to sell (if required), but does not bind a buyer to buy. Upon acceptance of the option the unilateral contract becomes synallagmatic, obliging both parties, the one to sell, the other to buy. It seems pertinent to remark that the Quebec Civil Code, though modelled upon the Code Napoléon, rarely coincides with it, and often departs widely from its provisions, as in the case of the article cited. The resort to commentaries upon the French Code for guidance in the interpretation of the Quebec Code is sometimes misleading.

In *Barrette* v. *Gareau*[1] *quo warranto* proceedings were taken against aldermen of the town of Verdun in respect of their being disqualified by reason of not having paid municipal dues. By the law of the Province—

> Any person who while acting as mayor or alderman or filling other municipal office becomes incapacitated while in office shall *ipso facto* lose his office, and his seat shall become vacant.

Greenshields J. doubted whether the legislature intended such a result in case of non-payment of taxes (that being one of the enumerated disqualifications), but declared that the language of the statute,[2] for which he could find no precedent in English or Canadian legislation, left him no alternative but to pronounce the seats vacant.

> If by the mere operation of law *ipso facto* an alderman's seat is vacant, then every hour, every moment, he fills that office he usurps it, and it is beyond his power by curing his disability to cease being a usurper.

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[1] R.J.Q. 49 C.S. 173.

[2] R.S.Q. 1909, Arts. 5362–5.

INDIA.

[*Contributed by* SIR E. J. TREVELYAN.]

Adopted Son.—The position of the adopted son of a Hindu has now been clearly defined in many decisions. As the adoption amounts to a complete affiliation, he is for all purposes treated as if he were the son of the loins of his adoptive father.

There is, however, an exception to this rule in the case where a son is born to his adoptive father after the adoption.

This complication is met by a smaller share of the inheritance, or of the joint family property, than he would have received if the son had not been born being given to the adopted son. The Bengal school gives him one-half of the share of a natural-born son. The Benares school gives him one-third of such share, and the schools prevailing in Southern India and in the Bombay Presidency give him one-fourth of such share. The Bengal High Court in *Raghabamund Dass* v. *Sadhu Churn Dass*[1] extended this rule by declaring him entitled only to the smaller share when he was competing with relations other than the natural son of his adoptive father. This decision has now been disapproved of by the Judicial Committee in *Nagindas Bhugwandas* v. *Bachoo Hurkissondas*,[2] and their lordships have limited the rule of the lesser share to the case of a competition between the adopted son and his adoptive father's natural-born son. In that case two brothers died. To one a posthumous son was born; subsequently the widow of the other, by the authority of her deceased husband, adopted a son to him. Upon a partition of the joint family ancestral estate between the two sons, it was held that the adopted son was entitled to a share equal to that taken by the son of his adoptive father's brother.

Effect of Migration of Memans to Africa.—Although the decision of the Judicial Committee in *Abdur Rahim Haji Ismail Mithu* v. *Halimabai*[3] was not given in an appeal from India, but in an appeal from the Court of Appeal for Eastern Africa, it is of some importance in British India, as illustrating the application of the rule that by custom Memans have retained a right to questions of succession and inheritance being determined by Hindu law instead of Mahommedan law, by which they are bound in other respects.

[1] (1878), I.L.R. 4 Cal. 425.

[2] (1915) L.R. 43 I.A. 46.

[3] *Ibid.* 35.

Some four or five hundred years ago the Loannas, a sect of Hindus located in Sind, were converted *en masse* to the Mahommedan faith, and took the name of Memans. A century or so later they migrated to Cutch, where they settled. Upon their conversion to Islam the Memans retained their Hindu law of succession and inheritance as a customary law, and their right so to do was established in 1847 before the Supreme Court of Bombay in a case which has been frequently followed.

The Judicial Committee were dealing with a case relating to the descendants of a Meman who had migrated to Mombasa about half a century ago. At Mombasa the succession to Mahommedans is in general governed by Mahommedan law, but as their lordships said, it would probably be open to immigrants to prove that they have brought with them and preserved a custom establishing a special law of succession.

Their lordships held that the presumption arising from the facts proved and the weight of evidence showed that the Memans of Mombasa were governed entirely by the Mahommedan law. In coming to this conclusion they made the following important observations: "Where a Hindu family migrate from one part of India to another, *prima facie* they carry with them their personal law, and if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted, but when such a family emigrate to another country, and, being themselves Mahommedans, settle among Mahommedans, the presumption that they have accepted the law of the people whom they have joined seems to their lordships to be one that should be much more readily made. All that has to be shown is that they have so acted as to raise the inference that they have cut themselves off from their old environments. The analogy is that of a change of domicil on settling in a new country rather than the analogy of a change of custom on migration within India. The question is simply one of the proper inference to be drawn from the circumstance."

Examination of Accused.—The Indian Criminal Procedure Code[1] permits and requires a magistrate or judge to question the accused "for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him."

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[1] Act V. of 1898, s. 342.

Although the object of this provision is to assist the accused, it has undoubtedly been frequently used for the purpose of entrapping him into making an incriminatory statement. The High Courts in India have frequently emphasised the object of the provision. In the recent case of *Abibulla* v. *Emperor* [1] the High Court of Madras has shown that unless there be evidence against him the accused cannot be examined, and that if in the absence of such evidence he is examined, his statement cannot be used against him.

In this connection it may be observed that the Indian Legislature might well consider whether an accused person should not be permitted to give evidence on his own behalf.

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[1] (1915) 6 *Criminal Law Review* 374.

NOTES.

Commercial Law of the Empire.—Sir James Aikins as President of the Canadian Bar Association has been directing the attention of lawyers and business men to the great importance in the interests of the unity of the Empire and the cementing of commercial relationships of unifying the mercantile laws. Elsewhere in this issue is a revised edition of a paper read twenty years ago by Sir John Macdonell before the representatives of the Chambers of Commerce of the Empire. Progress has been slow, but there has been distinct advance. There are advocates of different methods to expedite matters. In this connection Mr. W. G. Smith's paper is suggestive in showing the way in which in the United States a number of legislatures have endeavoured to secure uniformity in commercial law. One of the first steps towards advance is to have a clear statement of the existing position, and that was provided not long since for the first time in a work under the editorship of Mr. Justice Scrutton and Mr. W. Bowstead—*The Commercial Laws of the World,* of which the British Empire occupied six volumes. But it is significant that although the literary portion was wholly the work of English lawyers, the book was produced by a German firm. With this statement, supplemented by the papers in this issue, it is possible to see some of the main lines in which there is still a good deal to be done. As to the methods by which unity is to be obtained it is not the business of this Journal to advocate any one in particular, but it is hoped that from time to time it may be possible to print further papers dealing with the subject from other points of view.

Many would agree with a suggestion as expressed by Professor Lee, Dean of the Law Faculty in McGill University, in a paper on

Uniformity of Law in the British Empire read before the Canadian Bar Association:

> As things stand at present, if you made a uniform Code for the Empire to-day, you would have eighty legislatures tinkering at it to-morrow. Besides, I am no advocate of Teutonic methods. We are a federation of free nations. Let each section of the Empire keep and make its own law as it pleases. At the same time, there is no need to maintain a wasteful and unnecessary diversity. There are many branches of law which are the same in substance for the whole Empire. There are other parts of the law in which uniformity is desirable and attainable. If, after much labour, any such topic has been codified by the Imperial Parliament, or by one of the Dominions, we should consider very earnestly whether we cannot adopt that codification *verbatim*, instead of doing the work over again for ourselves, and perhaps doing it not so well.

On the other hand, in a paper read at the recent meeting of the British Imperial Council of Commerce Mr. J. E. Hogg advocated the unifying of commercial law.

> By "unifying" the law [he said] is here meant merely doing for the whole Empire what the Federal Parliaments of Canada and Australia have respectively done for the States in Australia and Provinces in Canada. Take the case of Australia. In 1909 a Bills of Exchange Act was enacted by the Australian Parliament which for most (not absolutely all) purposes superseded the similar Acts of the six States—New South Wales, Victoria, etc. Our typical London banker need now only consult one statute for the Australian law in lieu of six statutes. So in Canada, one statute only has to be consulted for the whole of the Dominion. Apply this to the Empire. Why not let the Parliament of the United Kingdom enact one Bills of Exchange Act for the whole Empire—superseding the fifty statutes or more passed by the fifty oversea legislatures? It is, just as in the case of similar or identical statutes being passed, merely a matter of negotiation between the different parts of the Empire.

The Council passed the following resolution:

> That in the opinion of this Conference it is desirable that commercial law should be codified and assimilated as far as possible throughout the Empire and that each branch of commercial law should be separately dealt with.

While referring to the commercial development of the Empire, the opportunity may be taken to direct attention to Baron Heyking's paper, written from a long experience, as to the part which may be taken by the Consul.

As a recent development of the activities of "Commercial agents" may be mentioned a pamphlet prepared by Mr. B. J. Wolfe for the information of business men upon the commercial laws of England, Scotland, Germany, and France, and issued by the United States Department of Commerce. It is somewhat fragmentary, but it contains a good deal of information about the jurisdiction of the Courts, company, bankruptcy and other laws, with a useful glossary of French and German legal terms.

Canadian Bar Association.—The full text of the address of the President, Sir James Aikins, K.C., M.P., at the first annual meeting upon the advancement of the science of jurisprudence in Canada and the address dealing with the uniformity of laws in Canada by Mr. Eugene Lafleur, from which quotations were made in our columns,[1] have been printed in a separate pamphlet, which also includes a third by Mr. E. P. B. Johnston discussing the first article of the Constitution of the Association: "to uphold the honour of the profession."

The Case of the Lost Million.—In an address at the last annual meeting of the Philadelphia Bar Association, the Hon. James M. Beck gave an interesting historical account of the source of the judicial control over the exercise of the legislative power embodied in the Constitution. He described as a myth "to which we American lawyers clung with patriotic complacency" the generally accepted idea that the framers of the Constitution developed a novel and unique institution in the Supreme Court of the United States and "thus first taught the principle that the judiciary could be an effective curb to the excesses of political power." Mr. Beck showed that this procedure is French in its origin, and that "the Constitutional Convention must have known that the French Courts during the three preceding centuries had protected the liberties of the French people by nullifying legislative edicts." The struggle between the two culminated in a celebrated case in which the famous baron, afterwards known as Pierre Augustin Caron de

[1] Vol. xv. pp. 277–81.

Beaumarchais, took the leading part. He was supposed to have been the recipient of a secret commission of a million dollars in connection with the supply of ammunition by France to the United States. The proceedings in connection with it were the subject of diplomatic negotiations until long after his death, and Mr. Beck has based upon them a very interesting contribution to legal and diplomatic history.

The Uniform Construction of the Uniform Acts.—Elsewhere in this number [1] Mr. W. G. Smith, a former President of the Conference of Commissioners on Uniform State Laws, gives an account of the efforts which have been made in the United States to secure greater uniformity in the laws. But if the text is the same it does not follow that the Courts will interpret it in the same way. There is no Privy Council whose decisions they must follow; nor do the Courts of the different States pay the same attention to each other's decisions as the Courts of the Dominions give to the decisions of the English Supreme Court. In commenting upon this aspect of the subject the *Harvard Law Review* [2] remarks:

> Uniformity of the "judge-made law" is as essential as uniformity of the statute law. In many cases the Courts have recognised the purpose of the Uniform Acts, and have construed them liberally, examining decisions from other Courts under the same sections of the Acts in order to secure uniformity, even though this may have necessitated a change from the old rule in their own State.[3] But a number of Courts have

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[1] See *supra*, p. 154.

[2] Vol. xxix, p. 541.

[3] Under the Uniform Bills of Lading Act: *Roland M. Baker Co.* v. *Brown*, 214 Mass. 196, 100 N.E. 1025.

Under the Uniform Sales Act: *Pope* v. *Ferguson*, 82 N.J.L. 566, 83 Atl. 353.

Under the Uniform Warehouse Receipts Act: *Kershaw* v. *Booth Fisheries Co.*, 177 Ill. App. 117.

Under the Negotiable Instruments Law: *Wirt* v. *Stubblefield*, 17 App. D.C. 283; *Vander Ploeg* v. *Van Zuuk*, 135 Ia. 350, 112 N.W. 807; *Mechanics' & Farmers' Savings Bank* v. *Katterjohn*, 137 Ky. 427, 125 S.W. 1071; *Vanderford* v. *Farmers' & Mechanics' National Bank of Westminster*, 105 Md. 164, 66 Atl. 47; *Union Trust Co.* v. *McGinty*, 212 Mass. 205, 98 N.E. 679; *Walker* v. *Dunham*, 135 Mo. App. 396, 115 S.W. 1086; *Rockfield* v. *First National Bank of Springfield*, 77 Oh. St. 311, 83 N.E. 392; *Felt* v. *Bush*, 41 Utah 462, 126 Pac. 688; *Trustees of American Bank of Orange* v. *McComb*, 105 Va. 473, 54 S.E. 14; *Columbian Banking Co.* v. *Bowen*, 134 Wis. 218, 114 N.W. 451; *First National Bank of Shawano* v. *Miller*, 139 Wis. 126, 120 N.W. 820.

ignored the ideal[1] and have placed a strict construction on the Acts, in favour of the law as declared in their own decisions before the adoption of the statutes, often without any examination of the decisions in other States.[2]

As the Negotiable Instruments Law is the oldest and the most widely adopted of the Uniform Acts, it has been interpreted the most frequently; but the way the Courts deal with it typifies their attitude toward the others. The Louisiana Court, overlooking the Negotiable Instruments Law and following the former rule of the State, held that an anomalous indorser was presumed to be, not an indorser, but a surety.[3] The Nebraska Court decided that a check was still an assignment under the law,[4] clinging to its former doctrine and citing no cases from other jurisdictions, though Virginia had previously reached the opposite conclusion.[5] Other Courts have failed to refer to the law at all in cases to which it applied.[6] The New York Courts have been amongst the worst offenders, frequently ignoring the law entirely, and very rarely citing any decisions except their own former ones.[7] They have been very reluctant to admit that any former rules are changed by the law.[1] As an illustration, the New York doctrine that one receiving a note as collateral security for a pre-existing debt was not a holder for value,[2] was declared by the first case after the adoption of the law to be changed,[3] the result which was reached by Courts of other States which had previously held the New York view;[4] but later New York cases, not citing decisions from any other jurisdiction, held the former rule not altered by the law.[5] The point has not yet been directly decided by the Court of Appeals, so that the final result in New York is still uncertain.[6]

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[1] These Courts disregard the express provision for uniform construction contained in the commercial Acts. The Uniform Warehouse Receipts Act, s. 57: "This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it." A similar provision is contained in the Uniform Sales Act (s. 74) and in the Uniform Bills of Lading Act. The Negotiable Instruments Law is entitled: "A General Act Relating to Negotiable Instruments (being an Act to Establish a Law Uniform with the Laws of Other States on that Subject)." See Williston, *Sales*, s. 617; Brannan, *Negotiable Instruments Law*, 2nd ed., 1. See 39 Am. Bar Ass'n Rep. 1068; 2 *Am. Bar Ass'n Journal*, No. 1, pp. 60–78.

[2] *Holliday State Bank* v. *Hoffman*, 85 Kan. 71, 116 Pac. 239; *First National Bank of Lisbon* v. *Bank of Wyndmere*, 15 N.D. 299, 108 N.W. 546. See 34 Am. Bar. Ass'n Rep. 1030; 39 *Id.* 1065, 1067.

[3] *John M. Parker & Co.* v. *Guillot*, 118 La. 223, 42 So. 782; *Hackley State Bank* v. *Magee*, 128 La. 1008, 55 So. 656. The Negotiable Instruments Law, ss. 63, 64, governs this point. See Brannan, *Negotiable Instruments Law*, 2nd ed., 75, 76.

[4] *Farrington* v. *F. E. Fleming Commission Co.*, 94 Neb. 108, 142 N.W. 297. This case is criticised in 27 *Harv. L. Rev.* 177. The result is directly opposed to the express words of the Negotiable Instruments Law, s. 189. See Brannan, *Negotiable Instruments Law*, 2nd ed. 155.

[5] *Baltimore & Ohio R. Co.* v. *First National Bank of Alexandria*, 102 Va. 753, 47 S.E. 837.

[6] *First National Bank of Lisbon* v. *Bank of Wyndmere*, 15 N.D. 299, 108 N.W. 546; *Tamlyn* v. *Peterson*, 15 N.D. 488, 107 N.W. 1081; *Walters* v. *Rock*, 18 N.D. 45, 115 N.W. 511; *Polhemus* v. *Prudential Realty Corporation*, 74 N.J.L. 570, 67 Atl. 303; *Heavey* v. *Commercial National Bank of Ogden City*, 27 Utah 222, 75 Pac. 727; *Yakima Valley Bank* v. *McAllister*, 37 Wash. 566, 79 Pac. 1119.

[7] *Birmingham Trust & Savings Co.* v. *Whitney*, 95 N.Y. App. Div. 280, 88 N.Y. Supp. 578; *Oriental Bank* v. *Gallo*, 112 N.Y. App. Div. 360, 98 N.Y. Supp. 561; *Haddock, Blanchard & Co.* v. *Haddock*, 118 N.Y. App. Div. 412, 103 N.Y. Supp. 584; *Williamsburgh Trust Co.* v. *Tum Suden*, 120 N.Y. App. Div. 518, 105 N.Y. Supp. 335; *Hyman* v. *Doyle*, 53 N.Y. Misc. 597, 103 N.Y. Supp. 778; *Citizens' Savings Bank* v. *Couse*, 68 N.Y. Misc. 153, 124 N.Y. Supp. 79.

The Commissioners on Uniform Laws recognised the menace to uniformity in the growing divergence in judicial interpretation,[7] and in 1913 they appointed a Committee on Uniformity of Judicial Decisions to combat this tendency.[8] This committee has not only brought the need of a uniform construction to the attention of every Court of last resort in the United States, but is also tabulating all the decisions rendered under the commercial Acts, and on request furnishes reference of all the cases under any section of any Act to the Courts.[1] The principal case, throwing the influence of the Supreme Court vigorously on the side of uniform construction, is an encouraging sign. It is to be hoped that all the Courts will come to recognise the purpose of the Acts to secure uniformity, and after freely examining decisions from other States will construe the Acts liberally so as to bring their own decisions into accord. Not till then will there be actual uniformity of law.

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[1] "We may take judicial notice that the commission appointed to revise and codify the statutes was created, in the main, to codify existing laws, and not make new rules; and certainly it was never intended that settled usages in respect of commercial paper, founded upon decisions covering a period of eighty years and uniform in application, should be overthrown in the construction of ambiguous and obscure expressions used by such a body." *Sutherland* v. *Mead*, 80 N.Y. App. Div. 103, 109, 80 N.Y. Supp. 504, 509.

[2] *Coddington* v. *Bay*, 20 Johns. 637, is the leading case for the old New York rule.

[3] *Brewster* v. *Shrader*, 26 N.Y. Misc. 480, 57 N.Y. Supp. 606. The Negotiable Instruments Law, ss. 25, 27, governs this point. See Brannan, *Negotiable Instruments Law*, 2nd ed. 32 *ff*. It seems clear that the law was intended to change the old New York rule on this point and bring it into uniformity with the prevailing doctrine.

[4] *Graham* v. *Smith*, 155 Mich. 65, 118 N.W. 726; *State Bank of Freeport* v. *Cape Girardeau & C. R. Co.*, 172 Mo. App. 662, 155 S.W. 1111. See *Brooks* v. *Sullivan*, 129 N.C. 190, 39 S.E. 822. In *Payne* v. *Zell*, 98 Va. 294, 36 S.E. 379, the Court said that whatever the rule had been at common law, the Negotiable Instruments Law had settled it in accord with the above cases.

[5] *Sutherland* v. *Mead*, 80 N.Y. App. Div. 103, 80 N.Y. Supp. 504; *Roseman* v. *Mahony*, 86 N.Y. App. Div. 377, 83 N.Y. Supp. 749; *Hover* v. *Magley*, 48 N.Y. Misc. 430, 96 N.Y. Supp. 925. Cf. *In re Hopper-Morgan Co.*, 154 Fed. 249. See criticism of above cases in 27 Am. Bar Ass'n Rep. 658; 34 *Id*, 1034 ff.

[6] In later New York cases there are *dicta* to the effect that the Negotiable Instruments Law has changed the former New York rule. See *King* v. *Bowling Green Trust Co.*, 145 N.Y. App. Div. 398, 402, 129 N.Y. Supp. 977, 980; *Broderick & Bascom Rope Co.* v. *McGrath*, 81 N.Y. Misc. 199, 201, 142 N.Y. Supp. 497, 498. And it is fair to say that the more recent New York decisions show a more liberal disposition towards the Uniform Acts. *Van Vliet* v. *Kanter*, 139 N.Y. App. Div. 603, 124 N.Y. Supp. 63; *King* v. *Bowling Green Trust Co.*, 145 N.Y. App. Div. 398, 129 N.Y. Supp. 977; *Casper* v. *Kuhne*, 79 N.Y. Misc. 411, 140 N.Y. Supp. 86. "The desirability of uniformity in the laws of various States with reference to negotiable instruments is so obvious, and the legislative intent to harmonise our theretofore conflicting decisions with those of other jurisdictions is, to my mind, so clearly expressed, that full effect should be given thereto." *Broderick & Bascom Rope Co.* v. *McGrath*, 81 N.Y. Misc. 199, 201, 142 N.Y. Supp. 497, 498.

[7] See 34 Am. Bar Ass'n Rep. 1051 ff.; 38 *Id*. 1009 ff.; 39 *Id*. 1065.

[8] 38 *Id*. 980.

Workmen's Compensation Laws.—We have received the latest edition of the digest of Workmen's Compensation and Insurance Laws (Workmen's Compensation Publicity Bureau, New York), revised to the end of 1915, and containing thirty-five Acts arranged under forty-five headings. The scope of the digest was described recently by Mr. Rosenbaum in an article upon Labour Legislation in the United States,[2] so that it is sufficient to note some of the additions during 1915. Eight States and two territories placed a Compensation Law on their statute books. In fourteen States the existing laws were amended, and in twenty-five others the law was extended either to insurance of compensation, or in respect to the administrative aspect of the subject. Some important decisions were given as to the constitutionality of these laws in different States, but on the whole the main principle now seems to have received general recognition. There are now thirty-three States and territories which have Compensation Acts.

The Comparative Method in Jurisprudence.—Many just claims have been made for the utility of the comparative method of studying jurisprudence. Rarely have these been presented with greater cogency than in an address recently delivered at Montreal by Professor Lee, Dean of the Law Faculty at McGill University. We quote one striking passage of interest to the English lawyer :

> Just as diversity of language serves to keep men apart, to alienate sympathy, to prevent mutual understanding, so it is with law. The Civil Law and the Common Law has each its peculiar forms of thought, its own modes of expression. Partly these correspond with real and

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[1] See *Proceedings of the Twenty-fifth Conference of Commissioners on Uniform State Laws*, p. 202 ; 39 Am. Bar Ass'n Rep. 1067, 1068.

[2] Vol. xv. pp. 13–23.

fundamental differences, but partly also they merely conceal real and fundamental resemblances. A good deal of the misunderstanding that exists between the two systems is due to unnecessary and removable ignorance. This is intelligible and on one side at least excusable. Small wonder that the civilian stands aghast when confronted with the strange historical survivals which permeate your system, with your distinction of real and personal property, with your queer refinements between freehold and leasehold, conditional limitations and conditions subsequent, contingent remainders and executory interests, easements and profits, and half a hundred things more. This is pardonable, for your law is formless and unsystematised. But there is less excuse for the followers of the Common Law to be unacquainted with the language of the Civil Law. If you have not the time or the inclination to study the historical progress of Roman law, you can at least, in the Institutes of Justinian, acquaint yourselves with the garnered results of a thousand years of development. Certainly the Institutes has its defects as a text-book. Like most things in this world, it might be better than it is. But its defects are defects which stimulate thought. I had rather have a student find his way through it aided by Moyle's or Sandar's commentary than get a facile and undigested knowledge from some second-rate epitome. When he has mastered it, he will know the grammar, so to say, and something of the language of the Civil Law. He will have learnt that a usufruct is the same as, and yet different from, a life-estate. If he takes the trouble to think, he will begin to understand what a *fidei commissum* is and how far it resembles a trust. Above all it may begin to occur to him—what I take to be the most essential thing in legal education—that the terms and forms of his own system, even some of its fundamental concepts, are merely transitory and accidental; that they might have been other than they are; that they often might have been better than they are; in a word, that you cannot understand your own law until you understand at least one system of law which is not your own, just as you cannot know yourself until you have learnt to understand and to sympathise with others. If the comparative method of study and the comparative habit of mind were generally followed and fostered in the legal departments of our academies and law schools, we should have less unthinking eulogy of this or that system, a freer interchange of ideas, a wider outlook, a surer grasp of realities. For, as I have said elsewhere, and I venture to repeat it here, the time is past in which each system of law can be envisaged as a distinct and isolated entity. The purposes which law must effect are the common purposes of civilised mankind; the new needs that arise are world-wide in their incidence. The brotherhood of mankind is not the dream of a silly or frenzied optimism. To realise it may be in time to come the sacred mission of the lawyer even more than of the diplomat or of the politician.

Japanese Law.—Some years ago a digest of law relative to the condition of foreigners under the treaties was prepared for the International Committee of Yokohama. As it is now out of print and out of date, Mr. J. E. de Becker has prepared a new edition which contains much useful matter.

A companion volume deals with Japanese trade mark law in a form specially suitable for business men.

The profits realised from the sale of the books are given to the British Red Cross Society; but even that excellent object hardly excuses the absence of an index.

"International Law Notes."—The primary purpose of a new publication with the title *International Law Notes* (London: Stevens & Sons) is to deal with matters of interest to practitioners in private international law. In particular may be mentioned notes of cases decided in France, Holland, and Italy somewhat upon the same lines as the more comprehensive treatment in Maître Clunet's Journal. Some attention is also paid to the law of the South American States, in particular the Argentine, which is singularly neglected in England, having regard to the large commercial interests there. From the comparative point of view may be mentioned a series of articles upon the Danish, French, and Italian Law of Prescription.

Royal Colonial Institute.—Special attention is being directed to three departments of the Royal Colonial Institute of particular importance at the present time. The first is the question of settling ex-service men from the United Kingdom upon the land, when war is over, both at home and overseas. Sir Rider Haggard has been visiting the self-governing Dominions in this connection on behalf of the Council. Means are required to print and distribute literature designed to give information. The second department provides lecturers upon the history and problems of the Empire to stimulate interest by sustained study inspired and guided by their direction. It is impossible to over-estimate the importance of this work when the sound solution of the vital problems affecting the future of the Empire depends in a large measure upon an informed public opinion. The third object is the publication of a work in three or four volumes giving a co-ordinated account of the contributions called forth in many ways and from all parts of the Empire during the war.

The City-Manager Plan.—In the last Review of Legislation, Mr. Newton Crane described the city-manager plan of municipal government. His article may be supplemented by some notes from the results of an investigation undertaken by Harvard University as published in the *American Political Science Review:*

> Nearly eighty municipalities in the United States are now conducting their affairs under the city-manager plan of government. In most of these places the city manager is an adjunct of the commission form, acting as the commission's non-political, administrative, and executive officer; in others his appointment has been arranged by special ordinance under the existing charter. The position is everywhere open to non-residents of the city in question; it is filled through appointment by the commissioners or councillors, the incumbent holding office during their pleasure. While the city manager's duties necessarily vary somewhat in different municipalities, in general his executive powers relate to the appointment, removal, and general control of all subordinates. . . .
>
> Few cities with large populations have adopted the plan; in fact, the majority have less than 10,000. Yet Dayton, Ohio, the largest city-manager municipality, is also the one from which we get most favourable reports and where the scheme seems to be working with most conspicuous results.
>
> As yet data relating to the actual operation of the city-manager plan are rather scarce and not wholly trustworthy. . . . In general, people living under the administration of a city manager are satisfied with its workings. Where it has been in operation for a couple of years, as in Dayton and Springfield, Amarillo, and La Grande, the general attitude towards it seems to be favourable, especially in the case of business men, chambers of commerce, citizens' leagues, etc. Where the labouring classes and the Socialists are concerned, however, the sentiment is not favourable, even to the extent, in Dayton and Springfield, of being opposed to the plan. . . .
>
> As for practical results during the short period of operation, the greatest good seems to have come in the field of financial administration. This has been shown in an all-round improved condition of finances—floating debts have been liquidated, customary bond issues to meet current expenses have not been issued, etc. . . . Not the least factor in the better regulation of the cities' financial affairs is the central purchasing agencies, by which all these cities obtain their supplies; in the smaller municipalities this is done by the city managers, in the larger by separate officials. In Dayton, during the year 1914, a saving of $20,000 is calculated to have been made through the purchasing of supplies alone.
>
> A list of the public improvements effected in these specific city-manager cities would be long. It is sufficient to say that special attention has been paid to such things as parks and playgrounds, sewer construction,

concrete bridges, and better fire-protection service. In the matter of street maintenance alone, a general improvement has been shown, particularly as regards street cleaning and repairing. In Dayton direct labour has been used for public improvements, with a considerable financial saving, and in all the cities the work done by contract has had unusually careful supervision. No noticeable results in producing new city plans have appeared, although city-planning boards have been organised in several of the cities.

The condition of the police and fire departments under the jurisdiction of a city manager is good. In most cases the police department has been subjected to a thorough reorganisation and new systems of record-keeping put into force. . . .

Another department which has been more or less reorganised in line with advanced ideas is that which concerns the public health. More stringent health laws, the appointment of public health officers, free clinics, a tuberculosis dispensary, public nurses, a city laboratory—these are some of the specific improvements which these cities have instituted for a better condition of public health. The inspection of milk and of the food supply in general receives far more attention than before the advent of the city manager.

From the foregoing it may be seen that, while improvements have resulted all along the line since the adoption of the city-manager plan, the changes are such as might have taken place under any efficient administration. It does seem to be true, however, that in financial matters a city manager is able to make substantial improvements, and in this department considerable savings may be expected in all cities after a sufficient period has elapsed to put the new plan on its feet. This result will in turn react on the efficiency of other departments. It may be of interest to note the advantages which are found in this form of government by the city manager of the largest city that has adopted it. These are simplicity, the basis of efficiency and economy in organisation, centralised authority, fixed definite responsibility, business methods, prompt and effective action, employment of experts when needed, commissioners who represent the whole city and not merely a ward, interest shown by a higher type of men in city service, short and non-partisan ballot, abolition of politics from the administrative end of government, separation of legislation from administration, independence from the ballot in selecting trained men for particular functions of government.

Prohibition and Woman Suffrage.—The *Round Table* deserves particular attention on account of its reasoned and thorough treatment of Imperial problems. The Canadian correspondent in the June issue deals with the way in which total prohibition and woman suffrage seem to have been expedited by the war :

In Ontario there is little prospect that the liquor traffic will ever again have legal recognition in the Province. It is also announced that referendums to determine if prohibition shall be established will be taken in New Brunswick and British Columbia. In Nova Scotia the Legislature has voted almost unanimously to abolish licences in the only county in the Province which is not now under prohibition. In Prince Edward Island all liquor and shop licences were cancelled some years ago. As the result of a referendum Alberta has abolished the retail trade in liquor. In Saskatchewan, which has a dispensary system, the Government has announced that the people will have an early opportunity to decide between the system and complete prohibition. A few weeks ago Manitoba in a referendum gave a majority of 24,278 for prohibition in a total vote of 73,260. In Quebec, where the question may also be submitted, the result may be doubtful. Even in the French Province, however, no licences are issued in 900 out of 1,200 municipalities. It seems to be certain that by the close of the year prohibition will be in effect in eight of the nine Canadian Provinces. Moreover, the Dominion Government has sanctioned a measure to prohibit export of liquor into Provinces under prohibition, save only for such purposes as will not conflict with provincial legislation.

In the four Western Provinces the outlook for equal suffrage is as favourable as for prohibition. Manitoba by unanimous action of the Legislature has extended the franchise to women. Equal suffrage has been established in Alberta. Saskatchewan, the Provincial Government has announced, will follow the example of Alberta and Manitoba. In British Columbia there will be a referendum and women will get the franchise if 50 per cent. of the voters declare for equal suffrage. In the older Provinces, however, no such feeling as has developed in favour of prohibition appears in behalf of female enfranchisement. In Quebec the subject is hardly discussed, in Ontario and the Eastern Provinces there is agitation but no prospect of early legislative action.

The alliance of these two interests well deserves closer study. Exactly the same combination is to be found in European countries and in some of the Australian States.

A Digest of English Civil Law.—Mr. Jenks and his colleagues are to be congratulated on having approached very near the completion of their *Digest of English Civil Law.* It was begun in 1905; and its arrangement was to some extent modelled on the German Civil Code. It states the leading rules of each branch of law in the form of concise propositions, with references to the more important of the decisions and enactments on which they rest. Nine successive instalments in slender volumes, dealing with Contract, Quasi-contract, Tort, Property, and Family Law had appeared by the autumn of 1915, and the final instalment, completing the subject of Family Law and adding an index, is now in the press. It is intended that the whole work, in a single volume of manageable size, shall be published in the course of next year. The work does not compete, and was never intended to compete, with such compilations as Mews' *Digest of Case Law* or Lord Halsbury's *Laws of England*; but to the student who wishes to disentangle principles from details, and to the lawyer or layman who desires to find a ready means of answering a question of principle, a Digest on this modest scale, and in this handy form, ought to be, and will doubtless be found to be, invaluable.

C. P. I.

The "Index to Periodical Literature."—Although periodical literature probably tends to become more ephemeral, there is still a great deal of matter of permanent value which is published in that form. Amid the multiplicity of periodicals a comprehensive index is an imperative necessity. Until 1907 Poole's Index provided all that was necessary, and since 1908 the American Law Library Association has been responsible for an excellent index to legal periodicals. But the Council of the British Library Association in conjunction with the proprietors of the *Athenæum* thought that there was room for a larger undertaking, and have issued a series of indexes dealing with the periodical literature of 1915, arranged in various classes. To the readers of this Journal the sections dealing with the "European War: its economic, political and military history" and "Economic and Political Sciences: Law" are of principal importance. This is not the place for any detailed criticism of the index; but there are certain general considerations which may deserve attention in the continuation of the publication. There is no heading "Dominions," although several articles dealing specially with the Dominions are included in the index. That the method of dealing with the British Empire requires careful re-consideration is true for index-makers, as well as other people. It is important, too, that there should be some clear principle whether the index is compiled by subjects or places. Why, for example, should "Old Age Pensions" be found under the names of the countries, while "Employers' Liability" is a substantive heading? We should much prefer to see the subjects adopted uniformly throughout with, if necessary, cross references from the places. Such an important subject as "Aerial Navigation" now has no heading in the legal section, and it is only by laborious research that the student can find the numerous references to it. British initiative should be capable of dealing with matters of this kind without slavish adherence to American models. Aircraft have an importance to the inhabitants of these islands of which the excellent index-makers on the other side of the Atlantic in their aloofness can have little appreciation. In the first issue of a big undertaking of this character there must be numerous points to receive re-consideration, so that these suggestions may be made in the confident expectation that the promoters will desire to make more perfect an excellent and useful piece of work.

Military Training in the Federated Malay States.—Mr. Justice Innes of the Federated Malay States writes from Kuala Lumpur: "Readers of the Journal may be interested at this time to learn that the legislature of these States has by Enactment 21 of 1915 provided that every male British subject of pure European descent not specially exempted shall be liable to undergo some military training, the extent of which is prescribed by regulations under the Enactment. The Enactment contains a good deal of detail, but its intention and effect can be expressed in a few words. For many years there has been in existence in the Federated Malay States a European Volunteer Force, which has attained a high state of efficiency and has proved its value. Its former commanding officer, Mr. A. B. Hubback, as he then was in civil life, is an officer in the Federated Malay States Civil Service, and was on leave at home when the war broke out. He volunteered for service, and after seeing a good deal of fighting in Flanders as Colonel of a Territorial regiment, he now holds the rank of Brigadier-General. The volunteer movement was well supported, but of course there were a considerable number of Europeans who through their age or the nature of their employment or profession were unable to undergo the training prescribed for volunteers. For example, it is impracticable for a European in sole charge of a rubber estate in an outlying district to attend frequent drills at headquarters, and equally impracticable for the whole staff of a larger estate to do so. But opinion throughout the country was unanimous that it was desirable that every able-bodied man should have some kind of military training which would enable him to be of use in an emergency. An influential body consisting of a number of the older members of the community who were not volunteers approached the Government with the request that steps should be taken to provide them with the opportunity of training in the use of arms and in elementary military movements of a lighter nature than is required for the Volunteer Force, but sufficient to fit them to take a useful part in the maintenance of order or the active suppression of disturbance among the Asiatic population. Legislation with this object had been brought into force in the neighbouring Crown Colony of the Straits Settlements, and the Federated Malay States Enactment 21 of 1915 adopted its main provisions.

"The effect of the Enactment is that every male British subject of pure European descent between the ages of eighteen and forty, who is not a member of the Volunteer Force and not exempted from service, shall be a member of a Reserve Force for the Volunteer Force, and undergo the training prescribed for such Reserve Force, and that every male British subject of pure European descent who is forty and less than fifty-five years of age, and who is not exempted from service, shall be a member of a Force styled the Civil Guard, and undergo the training prescribed for it. Persons under forty whose circumstances prevent them from serving either in the Volunteer Force or the Reserve Force to the Volunteer Force may serve in the Civil Guard. The Civil Guard would in case of need perform the duties of a military police force in aid of the ordinary police force. The training has been going on for some months with very satisfactory results. The Enactment does not prohibit the admission into either of the two forces which it creates of persons who are not British subjects of pure European descent, but are in other respects suitable.

"Happily there are at present no indications of any likely disturbance of the normal peaceful and prosperous condition of these States. It will be seen from what has been said in this note that if any such disturbance did come as a result of abnormal conditions elsewhere, it would not come upon a community unprepared to face it."

Mr. Justice Holmes.—The *Harvard Law Review* for April was issued in the form of a tribute to Mr. Justice Holmes. In one of an interesting series of articles, Professor Wigmore analysed his work as a judge in elucidating the law of torts. He described him as the only one of the long list of judges of the American Supreme Courts " who has framed for himself a system of legal ideas and general truths of life, and composed his opinions in harmony with the system already framed." Another trait in his opinions " and one that adds to their fascination, is the epigram instinct, which will not be suppressed." As a stylist the writer considers the learned judge to be unique and unapproached. There is none " in his genre, except Bowen." Reference is also made to his speeches displaying keen historic sense and a broad interest in literature. Upon the particular contribution of Mr. Justice Holmes to the interpretation of the Constitution, Mr. Frankfurter writes in some detail and considers that—

> To him the Constitution is a means of ordering the life of a young nation, having its roots in the past—" continuity with the past is not a duty but a necessity "—and intended for the unknown future. Intentionally, therefore, it was bounded with outlines not sharp and contemporary, but permitting of increasing definiteness through experience.

Financial Report for 1915.—The Society was founded on December 19, 1894, to keep all persons interested in legal, economic, and social questions fully informed of legislation in the different parts of the Empire, and, as far as possible, also in foreign countries. It has thus just come of age, and, in view of the widespread support which it is now receiving, it seems to be desirable to publish the balance sheet, especially as during the year 1915 the Committee decided to issue the Journal only to subscribers to the Society.

The grants from the Governments of the Dominions, India, and the Colonies not possessing responsible Government constitute the chief source of income, in which there has been a substantial increase during the past year. This is owing to the valuable support of the Colonial Office, and to the co-operation of the Crown Agents for the Colonies in bringing the work of the Society to the notice of the Governments. The increase of income from the Government grants has more than made good the temporary reduction of the grant from the Law Society, which for many years has given generous support to the Society.

Although there has been a welcome increase in the amount of income derived from individual subscribers, a Society which is carrying on a work of such importance to the Empire as that of the Society of Comparative Legislation is entitled to receive a much larger measure of support.

Under the new arrangement for issuing the Journal to subscribers only, the amount to be derived from sales will be reduced to quite a small sum, obtained by the sale of back numbers; and with reference to this, the Secretary, as far as he can, will be glad to assist subscribers in making complete their sets, though several of the early numbers are out of print and becoming very scarce.

On the expenditure side of the account the chief item is the cost of printing the Journal, which will be increased considerably in the present year. Nearly all the contributions to the Review of Legislation and the greater part of those for the Journal were supplied without payment. The change in the method of issuing the Journal has also added considerably to the secretarial work during the latter part of the year. Booksellers who purchased copies of the Journal from the publisher have been asked to send subscriptions on behalf of their customers, since there has been no desire to disturb existing relationships. For the most part the booksellers have readily co-operated in carrying out the new arrangement, and the Society is indebted to them for their assistance.

Although the balance in hand is somewhat larger than in previous years, it is not more than is needed as a reasonable measure of precaution in existing circumstances. The actual income of the Society cannot be estimated at more than £450, though there is ground for hoping that it may be increased appreciably in the present year. The summary of the legislation passed in the opening months of the war, and the volume which will contain the legislation of 1915, owing to their historic importance and their practical value, should appeal to a larger circle than any of the preceding reviews of legislation.

C. P. ILBERT,
Chairman of the Executive Committee.

ABSTRACT OF RECEIPTS AND PAYMENTS FOR THE YEAR TO DECEMBER 31, 1915.

RECEIPTS.

	£	s.	d.	£	s.	d.
To Balance in hand at January 1, 1915				98	10	10
,, Amount of arrears collected in 1915				48	6	0
,, Amounts received for current year from :						
(*a*) Law Society	21	0	0			
Lincoln's Inn	21	0	0			
Gray's Inn	10	10	0			
London Chamber of Commerce	5	5	0			
Royal Colonial Institute	5	5	0			
(*b*) Government Grants	195	10	1			
(*c*) Subscriptions	114	1	1			
				372	11	2
,, Sales [1]				123	13	6
,, Subscriptions in advance				26	10	8
				£669	12	2

[1] Stock in hand—4,029 copies.

PAYMENTS.

	£	s.	d.
By Publishing *No. XXXI.*	79	10	7
,, Publishing *No. XXXII.*	104	3	10
,, Publishing *No. XXXIII.*	96	2	7
,, Printing Consolidated Index	31	9	10
,, Editorial Fee to Assistant Editor	30	0	0
,, Honorarium to acting Assistant Secretary	30	0	0
,, Petty expenses including postage, typewriting, and clerk	26	5	6
,, Advertising	20	14	0
,, By rent of office	20	0	0
,, Fees for articles	19	6	0
,, Consolidated Index—balance of Editorial fee	15	0	0
,, Miscellaneous Printing and Stationery	7	8	5
,, Great Jurists—excess matter	4	11	2
,, Purchase of back numbers of *Journal*	1	8	0
,, Subscriptions in advance	26	10	8
Balance in hand at December 31, 1915	157	1	7
	£669	12	2

REVIEWS.

THE GROTIUS SOCIETY.

THE Grotius Society was founded in 1915 with objects which were declared as being "to afford facilities for discussion of the Laws of War and Peace, and for interchange of opinions regarding their operation, and to make suggestions for their reform, and generally to advance the study of international law."

The Society is a British society, with membership restricted to British subjects, but it carries on the work of the International Law Association, which included many foreign members, and the operations of which have been suspended by the war. The Grotius Society, though British, "is far from intending to discuss international questions from a purely British standpoint, or to support dogmas because they may be thought advantageous to British interests" . . . "the intention is to treat all international questions in an absolutely independent spirit, endeavouring to discover the truth whatever it may be, to discuss all the doctrines of international law, to examine them in the light of the present war, and to suggest reforms based on humanity and justice wherever possible."

The new Society has produced its firstfruits in the form of a set of papers read before it in 1915; and now collected under the title *Problems of the War*.[1] The firstfruits fulfil the expectations held out by the founders of the Society, and the papers supply interesting, instructive, and suggestive reading. Prefixed to them is an introduction by Professor Goudy, the Vice-President, which explains the objects of the Society, and adds "a few words on the events of the war, legally considered." The points which strike him most forcibly are the dangers of the doctrine of "military necessity" and "reprisals," and he supplies illustrations of their abuse.

The first of the collected "papers" is by Dr. Stubbs, on the Position of Enemy Merchantmen. He begins with a general statement that while the Allies have endeavoured to act in accordance with the rules of international law and in strict obedience to the Hague Conventions, and while Austria-Hungary appears to have committed no breach of the law or the Conventions, Germany, on the other hand, has acted as if international law had no force so far as she was concerned. She has assumed and consistently maintained the position of an outlaw. Dr. Stubbs sets down certain of the details which appear to him to justify these statements.

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[1] Papers read before the Grotius Society in the year 1915, vol. i. London: Sweet & Maxwell, 5*s*.

Sir Graham Bower, in dealing with the subject of Prisoners of War and Reprisals, takes as his text a striking passage from the preface to Grotius, *De Jure Belli et Pacis*. The present calamitous war has, according to him, developed a tendency in the military and civil authorities of the belligerents to depart from the customary and conventional rules of war, and to infringe on the natural rights of peoples, as defined in the law of nations. He divides and classifies this tendency as follows:

(1) A tendency to disregard the rights of neutral States.
(2) A tendency to confuse the distinction between combatants and non-combatants.
(3) A tendency to ignore the obligations of humanity to the wounded.
(4) A tendency to depart from the courtesy to prisoners of war which has been customary and conventional.

All these tendencies, he remarks, operate to the detriment of the law-breaker. "For, as justice and humanity alike depend on the observance of law, so every departure from law is a retreat from civilisation."

The conclusions which Sir Graham Bower draws from the correspondence published in the "White Book" as to the treatment of prisoners of war is that whilst the German regulations on this subject do not meet the requirements of the Hague Conventions, they are nevertheless consistent with humanity, and that in England the requirements of the Convention are generally fulfilled in spirit. But he comments severely on the departure made from established conventions by the differential treatment temporarily awarded to prisoners from German submarines, a departure which is now generally admitted to have been a serious blunder.

On the doctrine of reprisals the writer quotes largely from the English Manual of Military Law, emphasises the importance of watching and restricting the application of this doctrine, and suggests the expediency of adopting for future guidance rules on the lines of those proposed by the Russian Government at the Brussels Conference of 1874, and since summarised by Professor Holland.

Useful papers are contributed by that well-known authority the Rev. T. J. Lawrence and by Mr. Malcolm Carter on Nationality and War Zones, by Dr. Bellot on the Destruction of Merchantmen by a Belligerent, by Mr. G. G. Phillimore on Bombardments, by Mr. R. C. Hawkin on the

Belgian proposal to neutralise Central Africa during the European War, and by Judge Atherley Jones on the military effect of Attacks on Commerce.

Sir John Macdonell concludes the series by some Notes on Blockade. He sketches the chief features of the law of blockade as understood before the present war, he comments on the famous Order in Council of March 11, 1915, which has perplexed the minds of American lawyers, and has been made the subject of serious criticism by the Government of the United States; he touches on war zones, and he dwells on the mode in which changes of warfare and commerce have affected the law and practice of blockade. In dealing with this last branch of the subject he indicates pretty clearly his personal dissent from what some would term the "buccaneering" doctrine that, owing to the impossibility of foreseeing the exact effect of rules relating to military or naval operations, including blockade, there ought to be no rules, or rules drawn in terms so elastic and vague that they may be interpreted to meet any new or unexpected circumstances. But, at the same time, he recognises fully the difficulties in the way of obtaining any agreement between belligerents and neutrals as to their respective rights and duties, and of observing strictly any such agreement when made. Among these difficulties are the general incompatibility of interests of the belligerents and the neutrals, the difference between warfare on land and at sea, and the absence of suitable machinery for modifying rules. And, lastly, he has drawn up a list of questions on points of detail which ought to be considered, and to which answers should be attempted, before any revision of the rules of blockade is undertaken.

Sir John Macdonell's paper, especially, perhaps, his final list of interrogatories, illustrates admirably the spirit in which these problems of war ought to be approached. Whilst the war lasts we are not in a position to dogmatise or to predict, either in the field of international law or in the field of economics. We cannot see things in a dry light. We cannot divest ourselves of the passions and feelings natural and inevitable to those whose heart and soul are concentrated in a life-and-death struggle, a contest on the result of which not only our own future, but the future of civilisation depends. What we can do, and should do, is to think seriously about the conditions of the problems which arise during and out of the war, so as to prepare our minds for their solution when peace returns. And this is what the papers published by the Grotius Society help us to do.

C. P. I.

EXTRADITION.

MR. DE MELLO has written a thoroughly useful compendium[1] of the legislation governing the law of extradition in the Straits Settlements, with annotations of the decisions of the English Courts, so that the whole forms a complete book of reference for those who wish to study the authorities. The introduction summarises the procedure for extradition to and from foreign countries by treaty (the Extradition Acts), British possessions, and territories under British exterritorial jurisdiction (Fugitive Offenders Act, 1881), foreign countries not bound by treaty, and countries standing halfway between independent foreign States and British possessions as being foreign States under British protection. After an exhaustive statement of the British legislation, the treaties, and the reported cases there is a useful comparative table of the extradition offences specified in the treaties.

The common exclusions from extradition in the treaties are (1) political offences; (2) offences for which the period of prescription has run according to the law of the country from which surrender is demanded; (3) the surrender of subjects of each country is either expressly excluded or is not obligatory: (4) convictions by default or sentences *in contumaciam* are not treated as judgments; (5) the person surrendered is only to be tried for the offence for which the extradition is granted; (6) in some cases extradition is limited to offences committed in the territories of the contracting parties and therefore not to exterritorial offences. There are, however, variations from these general rules: *e.g.* Great Britain in her treaty with Switzerland (1880 and 1904) undertakes to deliver up all persons, while Switzerland excepts her own subjects from her otherwise similar covenant, and in our treaty with France (1876, 1896, and 1908) we accept a similarly unreserved obligation.

The United States seems to be the only foreign State which gives us an unreserved reciprocity in this matter. In some cases the procedure to be followed in the requisitions of extradition in the two countries is set out in the treaty, *e.g.* our treaties with Belgium and Denmark, France and Netherlands. In the case of non-subjects it is sometimes provided that the Government requested to extradite a person may surrender him to the State in whose jurisdiction the offence was committed, and in the treaty between Great Britain and Greece the Greek Government reserves its right to surrender such a person to the State to which he belongs. In our treaty with Russia there is the unusual provision that extradition may be granted at the discretion of the State to which application is made for crimes other than those specified therein for which according to the laws of both the contracting parties extradition can be granted. Another occasional feature of our treaties is, that where several States claim one person at the same time for offences committed in their respective territories the earliest applicant may be entitled to preference; *e.g.* our treaties with Italy, Netherlands, Portugal, Russia, Siam, Spain, and Switzerland.

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[1] *A Manual of the Law of Extradition and Fugitive Offenders applicable to the Straits Settlements, with the Acts, Ordinances, Orders in Council, Treaties, and Reports of Cases.* By Aloysius de Mello, of Gray's Inn, Barrister-at-Law, Advocate and Solicitor of the Supreme Court of the Straits Settlements. (Singapore: Government Printing Office, 1915.)

Extradition, depending as it does on law and treaty, has a special importance in international legal relations, and if uniformly applied it becomes an international police measure for enforcing the criminal law of the various nations.

G. G. PHILLIMORE.

AGRICULTURAL LEGISLATION.

IN the fourth volume of the *Annuaire International de Législation Agricole*[1] are registered the legislative enactments relating to agriculture in the year 1914. It is, however, to be noticed that the special legislation arising out of the war is reserved for a separate volume.

A novel feature in this issue is the introduction, which greatly facilitates the use of the register by arranging the material under heads, and so presenting a general view of the whole body of legislation. The number of laws and the variety of subjects which they handle are so great that the advantage of this new feature in the publication cannot be exaggerated.

The agricultural legislation of the year is grouped under eleven heads, each with sub-divisions. The same grouping may be followed here. The following are the heads:

1. *Statistics.*—It may be noticed that the Republic of Colombia, the Union of South Africa, and Denmark in reference to Iceland have perfected or organised their statistical departments.

2. *Commercial legislation.*—Under this head may be noticed two important Acts passed in the United States to strengthen the Sherman Anti-Trust Act of 1890, in the special direction of preventing the acquisition of monopolies of articles of food for human consumption.

3. *Financial legislation.*—Here the Mexican Law of June 1, 1914, is of interest. It uses taxation as an instrument for breaking up properties and for compelling owners to put their land to its most profitable use. The tax is imposed, not on the actual output of the soil, but on potential capacity to yield produce.

4. *Measures to increase the productivity of the soil.*—In these days when

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[1] *Institut International d'Agriculture: Annuaire International de Législation Agricole.* IV^{me} Année, 1914. (Rome, 1915.)

men's minds are turned to the necessity of utilising waste lands, the Prussian Law of November 7, 1914, may be referred to. It provides for the formation of companies (Consortium) of owners of bogs, heaths and similar tracts of land for the reclamation of their properties in concert and on a uniform plan. State assistance is offered out of the public taxes.

5. *Legislation for the improvement of live-stock, their immunity from disease, and the purity of their produce.*

6. *Agricultural organisation and agricultural education.*—A meteorological department has been established in France and placed under the Minister of Agriculture. But the most interesting and comprehensive measures are those taken in Greece. In that country great attention has been paid to agriculture in the year 1914. Attempts have been made to encourage the energy and confidence of agriculturists by making the State liable for losses incurred through a fall in prices, by establishing demonstration plots for illustrating the effect of various fertilisers, and creating special funds for the free distribution of artificial manures. A zootechnical department with proper provision for veterinary work has been created; three laboratories for agricultural chemistry have been established; local Chambers of Agriculture, charged with the duty of encouraging agricultural improvements, have been instituted; and, though this falls under heading 7, a phyto-pathological and entomological department has been organised to investigate plant diseases and insect pests.

7. *Measures for the study and prevention of diseases of plants and animals.*

8. *Legislation to promote agricultural co-operation, agricultural insurance, and agricultural credit.*—In all these directions the legislatures of many foreign countries have been active. A measure to afford facilities to landed proprietors to obtain loans on reasonable terms has been passed by the Government of the Ottoman Empire.

9. *Legislation affecting property in land.*—Another Act to protect and keep together small properties by means of State loans has been added by Denmark to the long list of enactments in defence of small owners against the economic tendencies of the day.

10. *Legislation affecting the relations of capital and labour.*—Our own Agricultural Holdings Act, 1914, may be noticed under this heading. Under the principal Act, a sale of an estate was a reasonable disturbance, consistent with good management, and therefore not entitling a tenant to compensation on quitting his holding. The Amending Act of 1914 has removed this blot and a tenant who receives a notice to quit in consequence of a sale is entitled to compensation on removal.

11. *Rural sanitation and police.*—Under the first heading no important legislation has been passed, and under the second only the measures taken by Greece and Sweden to prevent forest fires need be noticed.

R. E. PROTHERO.

ROMAN-DUTCH LAW.

Writing in 1908 in the *Law Quarterly Review* (vol. xxiv. p. 157) Dr. Bisschop called attention to the remarkable fact that there was no English book in existence which presented "Roman-Dutch law in a form sufficiently concise to give the student a clear and complete idea of the law which the Colonies of Ceylon, British Guiana, and South Africa inherited from the Dutch colonists of the seventeenth and eighteenth centuries." This reproach to our legal literature has now been removed by the appearance of Professor R. W. Lee's *Introduction to Roman-Dutch Law*.[1] Within the modest compass of some 350 pages Professor Lee has furnished us with what he describes as "a general picture of the Roman-Dutch law of the present day," *i.e.* as it exists in Ceylon, British Guiana, and, above all, in South Africa. The task which the learned author has set himself is one of some difficulty. We can well believe him when he tells us that, although the book is "not bulky," "its composition involved considerable labour." A glance at the footnotes with their abundance of varied authorities, Roman, Dutch, and English—ranging from Justinian's *Corpus juris* to the latest decisions of the Judicial Committee—would satisfy any one on that point. But the difficulty thus indicated is not the only one in the case. There are others, arising from the very nature of the task. An "introduction" to a system of law is not a digest; its proper object is not so much to furnish a complete synopsis of the positive provisions of the legal system, as to prepare and equip the mind of the student for an intelligent handling of the concrete rules and details with which he has to deal at a later stage. To that end the laboriously collected materials have to be carefully sifted; a great deal must be rejected; matters of principle—and Roman-Dutch law, like Roman law, is rich in principle—must be emphasised; rote-work must be avoided as much as possible, and crowded details left to the massive digests designed for practitioners. Professor Lee has successfully grappled with these difficulties, and the interesting picture of Roman-Dutch law which he here presents to us is a skilful piece of work. In some instances—yielding perhaps to a natural desire for completeness—he has somewhat overcrowded his canvas, and the beginner may find it hard to assimilate the rather breathless enumerations of positive rules on such topics as the powers and duties of guardians (p. 52 ff.), tacit mortgages (p. 164 ff., where we miss any attempt to explain the unifying principle underlying the thirteen cases mentioned), the persons "to whom performance (of a contract) can be made" (pp. 219–20), and "the interpretation of contract" (pp. 233–4). But, on the whole, the balance is well preserved and the total effect is satisfactory. Special attention may be called to the historical part. In view of the remarkable historical antecedents of Roman-Dutch law, this part is of great interest and importance. It is clear and concise, and entirely adequate.

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[1] Oxford: at the Clarendon Press. London: Humphrey Milford.

A few points of detail may perhaps be mentioned. On p. 28 the term "legal capacity" (the meaning of which is not explained) seems to be intended as a translation of "Rechtsfähigkeit" in s. 1 of the German Civil Code. But "Rechtsfähigkeit" in that section only means "capacity of *right*," or "capacity to have *rights*," and does not cover (as the term "legal capacity" would seem to cover) a capacity to incur liabilities.

In the section dealing with the law of property, the term "ownership" is sometimes used a little vaguely, as though it were much the same thing as a real right (in the strict sense of a jus *in re*). Ownership is, of course, a real right, and the most important and comprehensive of real rights, but there are many others, and to describe the lessee of land (in Roman-Dutch and English law) as "owner" of the land, or to speak of the "ownership" of land subject to a real servitude as "divided" between the dominus of the servient land and the person entitled to the servitude (the jus in re *aliena*), might easily lead to confusion, and the calling in aid of such terms as "a species of ownership" (p. 144) or "qualified ownership" (p. 162) will hardly help matters.

On p. 245 (note 1) "benefit of inventory" is a slip for "benefit of division."

The definition of suretyship on p. 264 seems more applicable to indemnity ("privative intercession") than to suretyship in the strict sense ("cumulative intercession"), no mention being made of the *accessory* character of the surety's liability. As to the point mentioned in note 14 on the same page, note 3 to § 581 of Vangerow's *Pandekten* seems to throw some light on the question.

On p. 267 the contract of carriage referred to appears to be a locatio conductio *operis* rather than a locatio conductio *operarum*.

On p. 282 it is suggested that the duties arising out of domestic relations, so far as they are legally enforceable, might be described as arising from *obligation* (created by operation of law). But such duties are not, in the proper sense, obligations, and to call them so would seem to involve one of those inaccuracies in the use of "obligation"—"the term of highest dignity and importance in all jurisprudence"—against which Sir Henry Maine entered a caveat long ago.

On p. 297 it is stated that in Roman-Dutch law "drunkards" (even when sober ?) cannot make a will, and Voet is cited as the authority. The case mentioned by Voet is, however, that of persons who are "tempore facti testamenti . . . ita vino inebriati ut, brutorum instar, omni rationis sanæ sensu destituti videantur."

But these, after all, are mere matters of detail, and do not interfere with the effect of the picture as a whole. Our predominant feeling, on closing the book, is one of gratitude to Professor Lee for a most careful, learned, and scholarly piece of work. The system depicted to us is one of exceptional interest, both dogmatically and historically. The learned author has high hopes for the future of the Roman-Dutch system in South Africa. It may there, he thinks, "assume a completeness and a symmetry which it has failed to attain in previous ages." "It will be a system in which the best elements of the Roman and English law will be welded together in an harmonious and indissoluble union." There could not be a more promising legal amalgam, and it is greatly to be wished that in South Africa, at any rate, it will find an abiding home and an open sphere for large, spontaneous development. As a system it has already proved its vitality and its adaptability to varying conditions. There is no surer sign of the greatness of a law than its capacity to produce great lawyers, and names of the great Roman-Dutch jurists—Grotius, Voet, Van Leeuwen, Van der Linden—are among the foremost names in legal history. Codification will doubtless come in due season. A people that, within a few years of a devastating war, could produce the law embodied in the great "Act to constitute the Union of South Africa" of 1909, must have constructive powers of no mean order. Under the sympathetic administration of the South African Courts great results may yet be achieved, and the watchword once commended by Jhering to his countrymen may prove applicable to modern South Africa—"through Roman (-Dutch) law beyond Roman(-Dutch) law" to a national South African law.

J. C. L.

VICARIOUS LIABILITY.[1]

In the comparatively small compass of 219 pages of text Dr. Baty presents a brilliant if somewhat audacious attempt to show that certain well-established principles of British law are alike illogical and unjust. The perusal of the volume irresistibly suggests the lines—

his tongue
Dropt manna and could make the worse appear
The better reason.

Yet in spite of the obvious prejudice of the author the work is well worthy of careful perusal, not only as an admirable example of special pleading, but also for the skill with which its writer handles his subject and marshals his facts. Dr. Baty characterises—

> the modern doctrine of vicarious liability as a veritable upas tree. Unknown to the classical jurisprudence of Rome, unfamiliar to the mediæval jurisprudence of England, it has attained its luxuriant growth through carelessness and

[1] *Vicarious Liability*. By T. Baty, D.C.L., LL.D. (Clarendon Press, Oxford, 1916.)

false analogy, and it cannot but operate to check enterprise and to penalise commerce.

This sweeping generalisation seems somewhat hasty, and is perhaps hardly justified by actual facts; any more than it would be to say that because the first suit for divorce in Rome was instituted by Sp. Carvilius Ruga in A.U.C. 523, there had been no unchaste wife in that city before.

Thus it appears from Cicero's oration for Milo that the crime for which the latter was ultimately sentenced was actually committed by his slaves, without his orders, without his knowledge, and in his absence; whilst from his oration for P. Quintius it seems that one of the many charges proffered against that unfortunate man was that whilst he was travelling in Gaul his attorney retook a servant by force from one Nævius, who had seized him in satisfaction of a judgment which he had obtained against P. Quintius in his absence.

As regards early English law, long before the introduction of frank pledge, a Statute of Athelstan (A.D. 925–940) enacted that every landless man should be compelled to put himself in dependence on some one who should be answerable for him; whilst on the Continent about half a century earlier (A.D. 864) a similar provision is contained in the Edictum Pistense of Charles the Bald. But after all the sanctions of civil and mediæval codes are rather matters of antiquarian interest than of judicial importance.

The growth of any comparatively new principle of law affords reasonable evidence that its development is the necessary consequence of some altered condition in commercial or social life. It is, moreover, almost self-evident that every living system of jurisprudence must necessarily be in a perpetual state of flux, crystallisation in any legal code, like ossification in the organs of the human body, being invariably indicative of death. If therefore certain dicta of a great lawyer, in comparatively recent times, introduce a new or re-vivify an old legal obligation—and especially if these dicta constitute the bases of a series of subsequent decisions—the circumstance raises a probability, practically amounting to certainty, that the obligation thus introduced is essential to existing exigencies of social or commercial life. Consequently to say that the superstructure thus edified "constitutes a gigantic inverted pyramid whose apex is nothing but *nisi prius* dicta" merely shows the writer is either too conservative or too conventional to believe any advantage can accrue to the body politic by the introduction of new ideas or new systems of thought in jurisprudence.

Yet in spite of the obvious, perhaps illogical, desire evinced by Dr. Baty throughout this work to dissociate the advantages of delegation from the disadvantages of vicarious liability for the acts of "servants, agents, and coadjutors," very much is to be said for the courage and discrimination with which the learned author challenges not only modern judicial incapacity in high places, but also the authority of the dicta of the most sacrosanct names in the annals of British jurisprudence. Thus on p. 29 he says:

> Neither Parker nor Pratt were extraordinary judges; it is possible their very unreported mediocrity actually covers the crystallisation of Holt's imaginations into legal dogma. Parker we know was a creature of Holt's. . . . It will, I think, be clear to most students that the doctrine of the employer's responsibility was due to no considered theory of civil liability and to no survival of early mediæval notions, but was derived from an inconsiderate use of precedents and a blind reliance on the slightest word of an eminent judge; and from the mistaken notion that his flights of imagination in picturing highway accidents were actual decided cases.

The expression of the learned author's zeal for the severance of privilege from responsibility perhaps culminates in his remarks (p. 53) on Quasi-Corporations, which term of course includes trade unions (those petted protégées of proletarian legislation); whilst on the following page (54) he strongly deprecates a very reasonable rule of the Supreme Court, stating—

> It is very much to be regretted that actions against members of such societies (*i.e.* trade unions), against the conduct of which prejudice exists, have been facilitated by the operation of R.S.C. Ord. 16. r. 9.

Adding, after discussing the effect of the rule:

> It would be still more improper, if possible, to hold such a judgment *in terrorem* over them, to be used in order to extort whatever sum a judicial or government authority considers commensurate with their moral obliquity.

Throughout the work, in spite of sincere appreciation of the capacity and acumen of the writer, one is irresistibly reminded of Don Quixote's chivalrous attack on the windmills, especially when Dr. Baty after tracing the dire effect of the evolution of the doctrine of vicarious liability in civil actions from the dicta of Holt C.J. in *Hern* v. *Nichols* to their logical sequences in cases like *Hambro* v. *Burnand*, (1904) 2 K.B. 10, or *Lloyd* v. *Grace Smith & Co.*, (1912) A.C. 716, concludes by remarking in relation to vicarious criminal liability that—

> the law is in a state which it is not too much to call discreditable to English jurisprudence.
>
> Vicarious criminal liability is imposed haphazard and with an arbitrary hand. Worse than all, it can seldom be certain whether the penalties of a statute can be safely held to be vicarious or not. . . .

W. WYATT PAINE.

CONTRABAND OF WAR.

DR. PYKE's thesis on the law of contraband of war[1]—to which an article by the same author on *The Kim* case in the *Law Quarterly Review* for January 1916 is a useful supplement—is a remarkably clear presentation of the law on a subject which perhaps more than any other will emerge from this war with a new connotation by reason of the new application of the rules regarding continuous voyage, conditional contraband, and the like.

In *The Kim* case the Prize Court had to consider the status of the cargoes of certain Norwegian and Swedish ships going from New York to Copenhagen seized part as absolute contraband (rubber), part as conditional contraband (foodstuffs, lard, and hides), on the ground that the goods were consigned to the neutral port with an intention to send them on to Germany, either by transhipment or by internal canal communication. The Court held that the doctrine of continuous voyage as applicable to the carriage of contraband is now part of the law of nations; it justified the modern innovation in procedure of admitting evidence in addition to the ship's papers and the depositions of the master and crew; and it reaffirmed its former ruling in *The Zamora* that the Court is bound by the directions of its municipal sovereign, and cannot refuse to execute them on the ground of incompatibility with the rules of international law.

The history of contraband, which the author traces in broad outline from the end of the fifteenth century up to the present conflict, shows how the application of the principle, viz. that the belligerent has a right to prevent neutrals from carrying on a trade with his adversary in articles which may be of service to his warlike operations, favours now the neutral, now the belligerent, according to the strength of their respective "pulls" at the time. In the present war the belligerents have been able to impose greater restrictions on neutrals, and neutral commerce has suffered considerably more than in former wars. In recent times the entire abolition of contraband has been proposed, *e.g.* by our own Government at the Hague Conference of 1907, so as to give neutrals complete immunity for goods in war. But the actual experience of this war has been greatly to extend it in a way that cannot be disregarded in any future international discussion of the subject. The chief example of this is the action of the Entente group of belligerents limiting the quantity of a particular article (which would be contraband if destined for the enemy) to be imported into a neutral State to the normal needs of that State, and on condition that no export of it shall take place from that country to a hostile State, such arrangements being made either with the neutral Government or with its knowledge and acquiescence through the medium of an association of traders of the neutral country. This is not inconsistent with the rule always observed in practice, that the question of contraband is one primarily between the belligerent Government and the neutral subject, though in recent times writers of authority have advocated making the neutral State responsible for its subjects engaging in contraband trade.

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[1] *The Law of Contraband of War.* By H. Reason Pyke, LL.B., Solicitor. (Oxford: Clarendon Press, 1915.)

Another point in which the present war makes a departure from previous practice is the suspension during the war announced in our latest Order in Council of the distinction between absolute and conditional contraband, which Anglo-American jurisprudence has consistently maintained and which was recognised by the Declaration of London, though the continental states have rejected it. Thus in the Spanish-American war the United States recognised the two kinds of classes, while Spain only admitted one; and in the Russo-Japanese war, Japan adopted the former view and Russia the latter.

Another question in the law of contraband, viz. under what circumstances foodstuffs for the civil population of a belligerent can be considered as contraband, has also received a clear answer in this war, to the effect that if the belligerent Government uses them at its discretion primarily to supply its military forces and regulates their supply to the civilian population, then they can be treated as destined for the use of the hostile Government and therefore confiscable.

The treatment of these and kindred topics and the standpoint from which the subject as a whole is dealt with are reasonable criteria for estimating the value of this book; and the author is to be congratulated on his enlightened attitude in upholding the principle that international law must move *pari passu* with the circumstances of the times, otherwise its principles may stagnate into formulas out of relation to current events, and therefore inadequate as guides in action. This is surely the most satisfactory because the most practical conception of international law as a system of rights and obligations. One must reject as pedantic the view which recognises only the express provisions of international treaties and disregards the customary common law between nations. This is perhaps natural to representatives of nations who have not been international states long enough to develop a morality and tradition based on precedent, and can in seriousness argue that the departure by one nation from some single term of an international agreement justifies another in regarding itself as released from all obligations of international law as regards the other. Equal objection can be taken to the academical view, which regards the rights and duties of nations in international law as absolute and immutable, *e.g.* the mutual relations of neutrals and belligerents, regardless of new conditions. The effect may be to make dogmas for all times and circumstances of particular applications of general rules, such as the rule of continuous voyage. International law, like any other code of national or individual conduct, must be continuously convincing nations and individuals of its soundness and appropriateness to the circumstances of the actual time. Its most effective instrument is the mass of intelligent opinion in a country, especially that of the commercial and industrial classes; and the course of the present war, and especially the so-called blockade by the Entente Powers, which is more properly a new application of the law of contraband than anything else, shows that the modern war brings into play all the economic no less than military forces of the contending belligerents.

G. G. PHILLIMORE.

PROFESSOR VAUGHAN ON JEAN JACQUES ROUSSEAU.

DR. VAUGHAN has done good work in producing a compilation of *The Political Writings of Jean Jacques Rousseau.*[1] The reader finds in these two volumes the *Discours sur l'Inégalité*, the *Economie Politique*, the *Contrat Social*, the Considerations of the Constitutions of Geneva, Corsica and Poland, and other minor political writings of Jean Jacques, in the original French, with many explanatory notes. Each is preluded by an interesting preface. There is also a thoughtful Introduction of over a hundred pages in which the Emeritus Professor discusses carefully some of the numerous problems which are connected with the life and works of Rousseau, and discusses them with fairness and judgment. It is a great convenience to a student of Rousseau to have all his political writings thus collected and arranged in chronological order—I believe for the first time. The author has also been at great pains to establish correctly the text; for instance, he has collated the various manuscripts of the *Contrat Social.* I trust that he will pardon me if I say that he has performed this task with all the minute accuracy and laborious patience of a German professor. He has discovered many manuscripts which lay buried in the libraries of Neuchâtel and Geneva, one of them being a history in manuscript of the latter city.

In the concluding chapter of his admirable work, Professor Vaughan deals in a masterly and trenchant manner with the absurd claim recently brought forward by some German professors, that Rousseau is the source from which they derive their new-fangled doctrines that to Germany has been given the mastery of the world, and that all other nations are to exist only on her sufferance. "Kant," they say, "was the disciple of Rousseau, Fichte the disciple of Kant, and Treitschke the disciple of Fichte, therefore it must have been Rousseau who taught us that Germany has a right divine to plant an iron heel on the neck of a prostrate Europe, and bade us teach our children songs of Violence and Hate." Dr. Vaughan disposes easily of this preposterous contention. But if this theory were true, if these professors really are disciples of Rousseau, of the man who loved the people and loathed tyranny, then let them write these words of his upon the phylacteries around their brows—words which they will find in his chapter on religion, a chapter which they have possibly overlooked: "Il n'est pas permis de serrer le nœud d'une société particulière aux dépens du reste du genre humain." (Vaughan, vol. i. p. 501.)

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[1] *The Political Writings of Jean Jacques Rousseau*, with introduction and notes. Edited from the Original Manuscripts and Authentic Editions by C. E. Vaughan, M.A., Litt.D., Emeritus Professor of English Literature in the University of Leeds. 2 vols. £3 3*s*. net. (Cambridge: at the University Press, 1915.)

W. BLAKE ODGERS.

THE LAW OF PUBLIC ENTERTAINMENTS.

THE passion for amusement has become so strong of late years, and the number of persons engaged in ministering to it so large, that a book[1] like this of Messrs. Settle and Baber is indispensable to let people know what control the law exercises over entertainers and entertained; and the more so because of the extraordinary vicissitudes which the Stage has undergone in the course of its history—now blessed, now banned. Starting as the handmaid of the Church, the play, in the form of the mystery or miracle play, was acted in church and the *dramatis personæ* furnished forth from the resources of the vestry, but so far had the theatre fallen from this high estate that in Charles I.'s reign Mr. William Prynne, barrister of Lincoln's Inn, lost his ears for suggesting that the Queen and her ladies had taken part in the acting of a stage play. With the reign of the saints the theatre vanished, but with the Restoration came revival, and the force of the reaction led to the wild licence of Sedley and Etherege, ending in its turn in the unlicensed actor being classed as a vagrant.[2] One of the notable phenomena to-day is the actor's social status and success. Vicissitudes like these make a strange patchwork in the Statute Book, and on them have been engrafted Acts relating to children's performances, to safeguard against fire, to dangerous performances, to music and dancing, with much else, while the theatre has now revolving round it in endless variety its satellites of the music hall and the cinema. All the Acts have been carefully annotated by the authors, and they have added—what cannot fail to be most useful—a collection of points from theatrical cases and a specimen form of contract.

E. M.

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[1] *The Law of Public Entertainments: Theatre, Music and Dancing, Stage Plays, Cinematographs, Copyright, Sunday Performances, Children, Theatrical Cases and Specimen Contracts.* By Alfred Towers Settle, of the Middle Temple and the Northern Circuit, Barrister-at-Law, joint author of "Theatres" in *Laws of England*; and Frank H. Baber, of the Inner Temple and the Oxford Circuit, Barrister-at-Law. (London: Sweet & Maxwell, Ltd.)

[2] 12 Anne st. 2 c. 25.

THE SOVEREIGN COUNCIL OF NEW FRANCE.

THE archives of Quebec and Canada contain a large amount of valuable material bearing on the proceedings of the Council which under the title of Sovereign or, from 1703, Supreme Council assisted the Governor and the Intendant in the work of governing New France from 1663 to the overthrow of the French rule by the British conquest. From these sources Dr. Cahall has been able to extract many interesting details for those chapters (iv.–vii.) of his monograph[1] on the Council which deal with its membership and organisation, procedure, functions and achievements in administration and judicial work, and the facts which he has brought out must be given due place in future histories of Canada under the French régime. These chapters, as the author readily recognises, are the more important part of the work, and possess such a degree of merit as fully to justify the inclusion of his treatise among the publications of Columbia University.

The first three chapters of the book which deal with the history of the Council are less convincing. Dr. Cahall justly claims that the constitutional position of the Council has been unduly ignored in histories of early Canada, which in the main deal with picturesque incident and personal struggles. But in his natural desire to correct this tendency, he has gone too far in the opposite direction: the struggles which took place in the Council in the time of Frontenac can be understood only when brought into the closest relation to the general history of the epoch, and as narrated by the author are without adequate motive or explanation. Much more serious is the fact that Dr. Cahall has fallen a victim to the tendency to exaggerate the importance of the Council and its success in asserting its independence of the Governor. We are told (pp. 78 and 94) that from 1679–98 its jurisdiction was extended to comprise even the Governor, that the Governor was made practically an honorary member, that his functions as vice-president were exercised by the eldest Councillor present, and that he had no part in its constructive policy either as a judicial or an administrative body. The exaggeration of this view can fortunately be corrected by the original authorities which the author generously quotes. So far from gaining such a position as would almost justify its title, the Council steadily lost the position which the constitution of 1663 purported to confer upon it. By 1674 it had lost the control of expenditure, and nearly all the control of the fur trade, which had passed into the hands of the Governor (pp. 194–7): even its judicial power had been seriously interfered with by the conferring of increased authority on the Intendant which deprived the Council of the right to make appointments to the subordinate Courts. Its attempt to make regulations in the absence of the Governor and the Intendant was suppressed once and for all in 1685. It is true that the Intendant once asserted that Frontenac was really merely an honorary member, but the position was, as Dr. Cahall elsewhere (p. 147) admits, very different: even in its judicial functions, its real strength, when the Governor was determined he could, like Frontenac in 1694 and 1698, and Beauharnais in 1728, effectively bring to an end the proceedings of the Council. Such administrative power as was wielded by the Council was derived, it is clear, from the desire of the Governor or the Intendant, as the case might be, to obtain its advice and help: in the last four years of Frontenac's second term of office (1689–1698), a decline in the administrative activity of the Council is contemporaneous with, and was doubtless caused by, his refraining from taking part in its proceedings. Nor was the Governor ever deprived of his vice-presidentship, for the simple reason that he never held that office: he possessed until 1680 the style of Chief and President, but the duties of President as opposed to the honours of that position devolved from 1675 on the Intendant, and the Governor himself seems (pp. 70, 71) to have felt that it was beneath his dignity to play the part of vice-president. Still less can it be said that the Council's jurisdiction ever extended to the Governor: Dr. Cahall in this view seems to have been led astray by his mistranslation (pp. 49, 189) of the record of the proceedings in the case of Fénelon, who took exception to Frontenac's presence on the Council in dealing with his case. Dr. Cahall thinks that "prendre à partie" means bringing a criminal suit, and so speaks of a suit by Fénelon against Frontenac: the context as well as the use of the terms elsewhere, as in the commission of the Intendant (p. 212, n. 1), shows that the only point was whether Frontenac was right in denying that his sitting on the Council could be called in question, when he was challenged in connection with a matter of the royal service or the public interests: that an action would lie against him was never then suggested by any one.

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[1] *The Sovereign Council of New France.* By Raymond du Bois Cahall. (London: P. S. King & Son, 1915. 9*s*.)

The true view of the position of the Council is that, in accordance with precedents in France itself, it tended from the first to become a judicial body pure and simple, that the Attorney-General, who was a very important member of the body, fought hard to secure its independence in that regard, but with only partial success, and that the Intendant, who possessed full powers of jurisdiction both criminal and civil, was yet sometimes willing to work with the Council, especially if he could thus annoy the Governor. This point of view has two obvious advantages: it enables us to reject the representation (p. 107) of the dishonest Auteuil, Attorney-General from 1679 to 1707, as an upholder of Canadian independence, and it explains the fact that in the eighteenth century the form of registration by the Council was deemed necessary for the validity of royal legislation. This fact denotes not an increase of power in the

Council (p. 192), for obedience to the royal orders was implicit, but the growing desire to assimilate the position of the Council to that of the supreme judicial bodies of contemporary France.

It is to be regretted that the book, though provided with a bibliography, is without an index, an inexcusable omission in a scientific work.

A. B. K.

ASSAM.

Assam, although the smallest Province of British India, has experienced more variations in size and status than any other, and has been greatly affected by its geographical situation. The Burmese ceded it to the East India Company by the Treaty of Yandabu after the Burmese War of 1824–6. It was administered partly by Bengal officers, partly by local Rajas, until it was wholly incorporated in Bengal by Proclamations of 1839 and 1842, and was under the Governor-General. When the Lieutenant-Governorship of Bengal was formed in 1854, Assam was retained under it until 1874. By two Proclamations of that year, the Assam districts were formed into a Chief Commissionership without a Legislative Council. But, meanwhile, in 1872, the Statute of 1870, which gave the power of summary legislation for backward tracts to the Executive Government, had been made applicable to certain districts and the Bengal Eastern Frontier Regulation of 1873 was passed by the Governor-General for the frontier districts of Assam. The Assam Code[1] recently published reproduces the Regulations passed, for Assam, under this power from 1873 to 1912 and still in force.

In 1874 the Governor-General passed, for all India, the Scheduled Districts Act, which authorised in the districts scheduled—and the whole of Assam is a Scheduled District—enactments to be declared in force in, or to be extended to, Assam, or to be not actually in force there or in parts thereof: there are also areas in Assam which are administered under Rules made under the Scheduled Districts Act: also "deregulationised tracts," in which the operation of enactments has been barred by Notification under one of the Frontier Regulations indicated above. Great use has been made of the Scheduled Districts Act: lists of the Acts "declared" by Notifications under it are here given: also, this Code shows *in extenso* the old Bengal Regulations between 1793 and 1833, the Local Acts of the Governor-General up to 1912, and the Bengal Local Acts from 1865 to 1899, in force in Assam.

But, by Proclamation (with effect from October 16, 1905), (1) the Chief Commissionership of Assam, and (2) certain Eastern Bengal districts, were declared, under the Indian Councils Statute of 1861, to be a Province, and were united under a Lieutenant-Governor of Eastern Bengal and Assam; with a Legislative Council for that Province. The Acts passed in this Council from 1907 to 1912, and still operative, are in this Code. Yet again, by Proclamation (with effect from April 1, 1912), the Lieutenant-Governorship of Eastern Bengal and Assam was broken up, and the old Chief Commissionership of Assam was revived, though, this time, with a Legislative Council constituted later in 1912: this Council passed no Enactments in 1912 to 1914. The present total population of Assam numbers 6,713,635 (British Districts), in an area of 53,015 square miles. The important interests of the Province are tea cultivation and its relations with frontier tribes.

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[1] *The Assam Code:* containing the Regulations and Local Acts in Force in the Province of Assam, etc. 2 vols. (Calcutta: Superintendent of Government Printing, 1915. *Rs. 7 As.* 8, or 11*s.* 3*d.*)

C. E. Buckland.

MAHOMEDAN LAW ACCORDING TO SCHOOL OF SHAFII.

Although there are many books on Mahomedan law according to the doctrines of the Hanâfi school of the Sunni sect, English lawyers have hitherto paid little attention to the doctrines of the Shafii school of the same sect. The reason for this is that by far the majority of the Indian Mahomedans follow the doctrines of Abu Hanifa.

The adherents of the school founded by Muhammad as Shafei in the early part of the ninth century are mostly to be found in Dutch colonies, in Central Asia, and in South-Western India, but it has been said that the doctrines of that school have lately made great progress among the Indian Mussulmans generally. It is thus becoming important that the authorities of that school should become available to English lawyers and students.

In 1882 Mr. Van den Berg published at the instance of the Government of the Dutch Indies a French version of the *Minhaj et Talibin* (guide of the earnest inquirers), a very important work of the Shafii school, which dates from the thirteenth century of the Christian era. Mr. Van den Berg's version has now been translated[1] into English by Mr. E. C. Howard, who, as District Judge of Singapore, has enjoyed peculiar advantages in acquiring a knowledge of this branch of Mahomedan law.

Like other ancient Mahomedan law works the *Minhaj et Talibin* contains much of what is not lawyer's law. An elaborate ritual for prayer, rules as to funeral ceremonies, fasting, religious retirement, pilgrimage, hunting and slaughter of animals, sacrifices, and racing and shooting of animals are combined with rules of civil and criminal law and of procedure. It is a most interesting work, and reflects the state of society amongst the Arabs at the time when it was written.

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[1] *Minhaj et Talibin.* A manual of Muhammadan Law according to the school of Shafii by Mahindin Abu Zakaria Yahya Ibu Sharif en Nawawi, translated into English from the French Edition of L. W. C. Van den Berg by E. C. Howard. 8vo, pp. xiii, 571. (London: W. Thacker & Co., 1914, 21*s*.)

There is much in it which is now of use—the law relating to marriage, dower, divorce, wills, inheritance and gifts would be applicable to cases in British India which are governed by the Shafii school.

The barbarities of the criminal law were common to all the schools of Mahomedan law. They are what might be expected of the country and the times. Prisons were apparently unknown. Death, amputation of limbs, flogging, fine and the price of blood were the punishments. Most elaborate rules are made for the execution of these punishments. Most cases of theft were punished with amputation. "Amputation of the right hand takes place for the first offence; that of the left foot for the second; that of the left hand for the third, and that of the right foot for the fourth." Defamation was punishable with stripes, fornication with stoning.

This translation will be a useful addition to the library of those who are interested in Mahomedan law as administrators, teachers, or students. It will also be welcomed by those who are interested in the ancient customs of the East, or in the practices of the followers of the Prophet in early times.

E. J. Trevelyan.

We have received the following:

Bose, B. D., *A Digest of Indian Law Cases, containing High Court Reports and Privy Council Reports of Appeals from India*, 1914. (Calcutta: Superintendent Government Printing.)

German Legislation for the Occupied Territories of Belgium: Official Texts. Edited by Charles Henry Huberich and Alexander Nicol-Speyer. (The Hague: Martinus Nijhoff, 3*s*.)

The Defeat of Varus and the German Frontier Policy of Augustus. By William A. Oldfather and Howard Vernon Canter. (University of Illinois Studies in the Social Sciences.)

A Digest of the Law of Partnership. By the Right Hon. Sir Frederick Pollock. 10th Edition. (London: Stevens & Sons.)

Documents Illustrative of International Law. By T. J. Lawrence. (London: Macmillan & Co., 7*s*. 6*d*.)

The Report of the Register of Copyrights for the Year 1914–1915. (Washington: Library of Congress.)

History of the Illinois Central Railroad to 1870. By H. G. Brownson, Ph.D. (Urbana: University of Illinois.)

And others which will receive notice in due course.

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